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The New York public health law provides that any person practicing medicine after conviction of felony shall be guilty of a misdemeanor. The question was recently presented to the United States Supreme Court, in the case of Hawker v. People, of New York, as to the constitutionality of this statute, when applied to one who had been convicted of a felony prior to its enactment, and though the court in an opinion by Mr. Justice Brewer upheld the statute, three of the members of the court dissented. The unconstitutionality of the act was alleged on the ground of an alleged conflict with article 1, § 10, of the constitution of the United States, which forbids a State to pass "any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The arguments for and against this contention may be thus briefly stated. On the one hand, it is said that defendant was tried, convicted, and sentenced for a criminal offense. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and, after the defendant has once fully atoned for his offense, a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is *ex post facto*. On the other hand it was insisted that, within the acknowledged reach of the police power, a State may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practice medicine; and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character. The court was of the opinion that the latter argument must control the answer to the question. No precise limits, they say, have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. Citing Dent v. West Virginia, 129 U. S. 114, 122, 9 Sup. Ct. Rep. 231, 233; State v. State Medical Examining Board, 32 Minn. 324, 327, 20 N. W. Rep. 238, 240; Thompson v. Hazen, 25 Me. 104, 108; State v. Hathaway, 115 Mo. 36, 47, 21 S. W. Rep. 1083; Eastman v. State, 109 Ind. 278, 279, 10 N. E. Rep. 98; State v. Call (N. C.), 28 S. E. Rep. 517. But if a State may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. Not that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not open to doubt that the commission of crime—the violation of the penal laws of a State—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience; and, if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in

one of the courts of the State? The conviction is, as between the State and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata*, and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care. That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive says the court. We must look at the substance, and not the form; and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that, and nothing more. The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law.

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—SALE OF DEFECTIVE ARTICLES—LIABILITY TO THIRD PERSON.—It has been held by the United States Circuit Court of Appeals for the Third Circuit, in the case of Bragdon v. Perkins-Campbell Co., that in the absence of fraud or deceit in effecting the sale, the maker and seller of an article not inherently dangerous in character is not liable to one not a party to the contract of sale who is injured because of defects in the material or construction of the article arising from the negligence of the maker. The court says in part: "We have, then, a case in which the essential element consists of a breach of duty; and the burden is on the plaintiff to prove facts sufficient to show what the duty is, and that the defendant owed it to her. 1 Shear. & R. Neg., § 8; Beach, Contrib. Neg., 6; Thomp. Neg. (preface), Dr. Wharton (Whart. Neg., § 24) defines a legal duty thus: 'That which the law requires to be done or forborne to a determinate person, or to the public at large, and is a correlative to the right vested in said determinate person, or in the public.' This definition may be properly applied in this case, and, so applying it, it appears that the supposed right of the plaintiff must be rested upon the affirmance of the proposition that to her, as a determinate person, the defendant owed a duty to carefully construct the saddle in question. But this proposition cannot be sustained. In the leading case of Langridge v. Levy, 2 Mees. & W. 519, the father of the plaintiff had bought from the defendant a gun, which was represented by the defendant, who knew it was intended for use by the plaintiff, to have been made by a certain manufacturer, and to be a safe gun. It had not been made by the manufacturer named, and, while the plaintiff was using it, it burst, and wounded him. The court said: 'It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant,' and 'we are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person, by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer.' The plaintiff's right of recovery was accordingly not sustained for breach of warranty or for negligence, but solely upon the ground that there had been fraudulent misrepresentation, and that the injurious consequence to the plaintiff was 'the result of that fraud.' This judgment was affirmed. 4 Mees. & W. 337. And the appellate court distinctly based its decision upon the same foundation as that which had been relied on by the court below. Thus, it plainly appears that both courts dealt with Langridge v. Levy as a case of deceit, and carefully avoided affording any excuse for implication that they would have sustained it as for negligence. The reason for thus distinguishing between these wrongs is not stated in either of the opinions, but it is, we think, quite obvious. Ordinarily, where a vendee accepts the purchased article, the vendor becomes, by reason of such acceptance, relieved from liability to third parties with respect to it. The vendee assumes, and the vendor stands discharged of, responsibility to them. But, where the vendor is chargeable with deceit—where he has induced the vendee's acceptance by false and fraudulent misrepresentations—the latter cannot be said to have consciously taken upon himself any duty of care; and that duty, therefore, if existent, is not shifted from the vendor, and he consequently remains liable. In Heaven v. Pender (1883), 11 Q. B. Div. 503, Brett, M. R., sought to lay down the rule: 'That whenever one supplies goods or machinery, or the like, for the purpose of either being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there will be danger of in-

jury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And if there be a neglect of such ordinary care or skill, whereby injury happens, a legal liability arises, to be enforced by an action of negligence.' It must be conceded that this proposition, if sound, would lend support to the contention of the plaintiff in error. But it is not sound. It affirms a view of the law which, in Langridge v. Levy, the court declined to adopt, and which was repudiated by a majority of the judges (Cotton, L. J., and Bowen, L. J.), in the case in which it was propounded. One of the judges last mentioned delivered, on behalf of both of them, an opinion, in which it is said: 'I am unwilling to concur with the masters of the rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negative. Take, for instance, the case Langridge v. Levy, to which the principle, if it existed, would have applied, but the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In every case where the decision has been referred to, the judges have treated fraud as the ground of the decision, as was done by Coleridge, J., in Blakemore v. Railway Co., 8 El. & Bl. 1035; and in Collins v. Selden, L. R. 3 C. P. 495, Willis, J., says that the judgment in Langridge v. Levy was based on the fraud of the defendant; and this impliedly negatives the existence of the larger principle which is relied on; and the decision in Collins v. Selden and in Longmeid v. Holiday, 6 Exch. 761, in each of which the plaintiff failed, was, in my opinion, at variance with the principle contended for. The case of George v. Skivington, L. R. 1 Exch., and especially what is said by Kleasby, B., in giving judgment in that case, seems to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and the case was decided by Kleasby, B., on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent, for the purposes of that action, to fraud, on which, as he said, the decision in Langridge v. Levy was based.' It is not necessary, for the present purpose, to further comment upon the English authorities. The reference made to some of them in the immediately preceding extract shows, we think, that in Heaven v. Pender the majority of the court were clearly right in declining to concur with the master of the rolls in laying down the larger principle which he entertained, and which, so far as it purported to be a deduction from the general rule as to negligence, has been disapproved by Sir Frederick Pollock in his standard treatise upon the Law of Torts. Pol. Torts (2d Ed.), p. 375, note E. Upon careful examination of the decisions of the courts of England, and in view of the conclusion derived from them by so eminent an English lawyer as the author to whom we have just referred, it seems perfectly safe to assume that this action would not have been sustained there; and it appears to be equally clear that there is no material difference in this regard between the law of that country and our own. The judgment of the Supreme Court of Pennysylvania in the case of Curtin v. Somerset, 140 Pa. St. 70, 21 Atl. Rep. 244, which was decided in 1891, is entirely satisfactory to us, and is, in principle, directly applicable. In that case the defendant had contracted to erect a certain hotel, according to plans and specifications. The building was completed and accepted. Thereafter, a girder, which in part supported its porch, gave way and the porch fell, injuring the plaintiff, who was a guest of the hotel. He sued the contractor, but it was held that he had no cause of action against him. His contention was that the accident was caused by the defective construction of the porch; that it was not according to plans and specifications; that the defects were not observable after the building was completed, and, in point of fact, were unknown to the hotel company when it accepted the building from the contractor. The court assumed the verity of these allegations (very like to those of the plaintiff in this cause), but held that the contractor was not liable to the plaintiff upon the contract, because there was no contractual relations between them; nor in tort, because such liabilities must be confined 'to the parties immediately concerned.' The authorities in the several States are not all perfectly clear upon the subject, but it is unnecessary to refer to them further than has been done by the learned judge in the court below. As was said by the learned judge who delivered the opinion in the case last cited by us: 'We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reasons.' The Supreme Court of the United States had before it, in the case of Bank v. Ward, 100 U. S. 195, a case involving very similar considerations. A lawyer, who, for his client, had erroneously certified the recorded title of certain real property, was sued by another person, who had suffered loss in consequence of his reliance upon the correctness of the certificate. The judgment of the court, so far as pertinent here, is well condensed in the headnote, where it is said: 'That there being neither fraud, collusion or falsehood by A, nor privity of contract between him and C, he is not liable to the latter for any loss sustained by reason of the certificate.' The court, in its opinion, applied this language: 'He only who, by himself, or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue for that neglect. * * *' Three members of the court dissented from the judgment, but apparently upon the ground that the attorney who gave the certificate was chargeable with knowledge that it was to be used, in some transaction of his client with another person, as evidence of the facts certi-

fied to, and that, therefore, the attorney should be held liable to such other person, not for negligently performing his contract with his client, but for, in effect, certifying to the person with whom his client was dealing (the plaintiff in the case) a fact as true, which, if he had exercised ordinary care, he would have known to be untrue. In other words, that the attorney was chargeable with culpable ignorance, where it was his duty to be informed, and therefore had committed a legal deceit, not only against his own client, but against the plaintiff as well. The case of Railroad Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. Rep. 837, though not directly in point, is worthy of examination in this connection. What is said in the opinion of the court at pages 271 and 272, 149 U. S., and page 837, 13 Sup. Ct. Rep., indicates, we think, that it was assumed that, except under special circumstances, the acceptance by the vendee of the subject of purchase and sale relieves the vendor from liability to a stranger for any injury resulting to him from negligent construction of the thing sold. See also Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. Rep. 400. There are cases which may seem to qualify the principle which we have discussed, but which are quite consistent with it, and which, as is pointed out in Curtin v. Somerset, *supra*, have no application to such an one as that with which we are now concerned. They decide that one who deals with a thing which is inherently very dangerous, involving 'death or great bodily harm to some person, as the natural and almost inevitable consequence' of lack of care, owes to the public at large the duty of extreme caution. Such a case is Thomas v. Winchester, 6 N. Y. 397, which in England has been thought to go too far. Brett, M. R., in Heaven v. Pender, *supra*. But it is hard to see in what respect it goes further than Dixon v. Bell, 5 Maule & S. 198, which was cited as a strong case, and apparently with hesitating acceptance, in Longmeid v. Holiday, 6 Exch. 761, where it was rightfully held that, as lamps are not in their nature explosive, liability for sale, without fraud, of an ill-made lamp, which exploded in use, is contractual only, and therefore does not extend to any person who could not sue on the contract, or on a warranty therein expressed or implied. See Pol. Torts, p. 440. In our opinion, Thomas v. Winchester was rightfully decided; but that case, and the others which follow its lead, do not at all conflict with our present judgment. The article here in question is not, like a poisonous drug, which was the harmful agent in Thomas v. Winchester, inherently dangerous, but is, like the lamp in Longmeid v. Holiday, not in its nature hazardous."

EXECUTION — INCOME OF TRUST FUND.—One of the points decided by the Court of Appeals of New York, in the case of Schenck v. Barnes, 50 N. E. Rep. 967, is that when a person while out of debt, has conveyed his property to a trustee, reserving to himself the payment of the net income during his life, with remainder over and with power in the trustee to sell, the income of such trust estate is not exempt from the claims of his creditors, but may be reached and applied to the payment of the claims of creditors arising after the creation of the trust. Two of the members of the court dissent. The court says in part: "The main question is whether a person can place his property in trust, with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put the life interest beyond the reach of creditors whose claims arose after the creation of the trust. The special term answered this question in the affirmative, and the appellate division has taken the contrary view. We are of opinion that the appellate division reached the proper conclusion. While it is true that in this and other States the English rule has been modified, which makes the interest of a beneficiary under a trust created for his benefit by a third party subject to the claims of his creditors, yet we have not ignored the general policy of the law, that creditors shall have the right to resort to all the property of the debtor not protected by statute. The provisions of the Revised Statutes, as construed by the courts, render this clear. In 2 Rev. St. p. 173, § 38, is the following provision: 'Whenever an execution against the property of a defendant, shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution, may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action, due to him, or held in trust for him; and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof, to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself.' This section has been substantially preserved in Code Civ. Proc. §§ 1871, 1879. It was at first contended that this statute protected absolutely the interest of a debtor in a trust created for his benefit by a third party, but it is now the settled law that this provision must be read with 1 Rev. St. p. 729, § 57, providing that the surplus income of a trust estate shall be liable in equity to the claim of the creditors of the *cestui que trust*. Williams v. Thorn, 70 N. Y. 270; Graff v. Bonnett, 31 N. Y. 9. The statute quoted (2 Rev. St. p. 173, § 38) clearly implies that a trust created by the debtor, under which he is the beneficiary, does not protect his interest from the pursuit of creditors, as it is, in contemplation of law, property which he has put aside for his own use, and consequently a part of his estate, to which creditors are entitled. This general principle is also recognized by Code, Civ. Proc. § 2463. A trust created by a debtor, and under which he is the beneficiary, is not affected by the provision of the Revised Statutes (1 Rev. St. p. 730, § 63)

which prohibits a person beneficially interested in a trust for the receipt of the rents and profits of lands from assigning or disposing of the same. The policy of this statute is clear, when applied to trusts created by third parties, but is without force when the debtor creates the trust. The statute is obviously designed to assist the creators of trusts in protecting and caring for the beneficiaries who are the natural objects of their solicitude and care, but it cannot be invoked by a debtor to protect a trust which he has created to serve in time of need as a refuge from his creditors. The defendant Barnes, being out of debt in October, 1893, was at liberty, if he saw fit, to give away all his property, real and personal, to those of his blood, or to strangers. There would be no creditor to complain if he was moved to act in so unusual and improvident a manner. As matter of fact, he did at that time, as to the real estate in question, devest himself of the legal title; reserving under a conveyance, in trust, a beneficial interest in the property for life, with remainder over. The present action in no way challenges the right of Barnes to thus devest himself of the legal title to this real estate; but plaintiff, as a subsequent creditor, seeks to have appropriated to the payment of her judgment such interest as Barnes reserved to himself in the property, and nothing more. It would be a startling and revolutionary doctrine to hold that this reserved interest cannot be reached by the plaintiff, as a creditor. If such is the law, it would make it possible for a person free from debt to place his property beyond the reach of creditors, and secure to himself a comfortable support during life, without regard to his subsequent business ventures, contracts, or losses. In Massachusetts and Pennsylvania it has been held that no such result can be accomplished. Bank v. Windram, 133 Mass. 175; Mackason's Appeal, 42 Pa. St. 330. The prayer of the complaint in the case at bar asks the court to determine the amount of the interest which defendant Barnes reserves to himself in the trust fund, and to order it sold and applied on the judgment. A person for whose benefit a trust is created takes no estate or interest in the lands, but he can enforce the performance of the trust in equity. 1 Rev. St. p. 729, § 60. This right to enforce is a chose in action, and personal property in the hands of defendant Barnes in the case before us, and liable in equity for his debts. Tompkins v. Fonda, 4 Paige, 448; Payne v. Becker, 87 N. Y. 153. It is the settled policy of this State that where property is held in trust for a debtor, and the fund proceeds from a third party, the creditor can only reach the surplus income after providing for the proper support of the *cestui que trust;* but, if the debtor created the trust, his entire reserved interest is a fund to which his creditors can resort. Graff v. Bonnett, 31 N. Y. 9. Hogeboom, J., in the case last cited (page 14), said: 'In other words, it was a legislative declaration, in language intended to be explicit, but possibly liable to some misconstruction, that property held in trust for the debtor, when such trust proceeded from himself, was in no case to be protected for his benefit; but, where the trust or the fund proceeded from some other source, the liability of the property to, or its exemption from, judicial seizure, was to depend upon the general provisions of law applicable to trust property.'"

CRIMINAL LAW—EMBEZZLEMENT — LARCENY.—The Supreme Court of Missouri holds in State v. Thompson, 46 S. W. Rep. 191, that where a person was indicted for grand larceny, and the evidence showed that the crime was embezzlement (if anything), it was proper to instruct the jury on that theory, and the conviction for embezzlement is valid, as especially provided for by Rev. St. 1889, § 3947, and that Rev. St. 1889, § 3947, in so far as it provides that a conviction of embezzlement may be had under an indictment for larceny, is not in violation of Const. Bill of Rights, § 10, providing that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, since the crime of embezzlement embraces all the elements of larceny except the taking, and is a crime of a lesser degree. The following is from the opinion: "The only question, then, is, whether, under section 3947, Rev. St. 1889, a person can be indicted for grand larceny and convicted of embezzlement under the same indictment, by reason of the provisions of that section which provide that upon an indictment for larceny the defendant may be convicted of embezzlement, and *vice versa*. The correctness of this instruction depends upon the proper solution of this question. At common law embezzlement was merely a breach of trust, and not an indictable offense, in which respect it differs from larceny. While embezzlement embraces in a large measure the characteristics of theft, it is, under our statute, a separate and distinct offense. Theft involves the idea of unlawful taking,—a trespass,—whereas embezzlement is the fraudulent conversion of personal property already in the lawful possession of the person who wrongfully and feloniously appropriates it to his own use. They are, therefore, similar in character, embezzlement being a minor grade or degree of larceny. In order to a conviction in the latter case, it must be shown that there existed a felonious intent to steal at the time of the taking of the property, while in the former the possession is lawful, and the intent to feloniously appropriate it is formed after it comes into the possession of the person by whom it is wrongfully appropriated. Under our statute the punishment for grand larceny and embezzlement is the same, and counts for both offenses may be joined in the same indictment. Rev. St. 1889, § 4103. And where they relate to the same transaction, as in the case at bar, the State will not be compelled to elect upon which count it will proceed. State v. Porter, 26 Mo. 201. In State v. Porter, *supra*, it was, in effect, held that a person indicted for grand larceny might be convicted of

embezzlement under section 15 of article 9 of the act concerning crimes and punishments. Rev. St. 1889, § 3947. In State v. Broderick, 70 Mo. 622, the defendant was indicted for larceny of three mules, and was found guilty of embezzlement. It was held that the verdict was proper, and that our statute expressly authorizes a person indicted for embezzlement to be convicted of larceny, and *vice versa*. See, also, State v. Owen, 78 Mo. 367; State v. Broderick, 7 Mo. App. 19. In case of larceny it must be made to appear not only that the felonious intent existed at the time of the taking, but that the property was moved in furtherance of the purpose to steal, while much less proof is required in case of embezzlement; so that larceny, being the greater offense, necessarily includes embezzlement. 'The crime of embezzlement embraces all the elements of larceny except the actual taking of the property embezzled; that being already in the rightful possession of the embezzler.' State v. Baldwin, 70 Iowa, 180, 30 N. W. Rep. 476. The instruction being in accordance with what has been said, there was no variance between it, the charge in the indictment, and the proof; and, unless section 3947 is in conflict with section 22 of the bill of rights in the constitution of Missouri of 1875, the judgment must be affirmed. This section provides that in criminal prosecution the accused shall have the right 'to demand the nature and cause of the accusation' against him. Of what right, if any, guarantied to defendant by the constitution, was he deprived upon the trial of this cause? The indictment informed him that he was charged with stealing $300 from Mrs. Buckner, as well, also, as of the time and place. He received the money for her all at one time, and appropriated nearly $300 of it to his own use at one time. He never at any time received but the one sum of money for her; and, while charged in the indictment with stealing the money, he knew perfectly well that it was for the wrongful appropriation of it to his own use. He could not possibly have been misled by the charge. It is true that it was held in Reg. v. Gorbutt, 1 Dears. & B. Crown Cas. 166, under an act of parliament which provides that a prisoner indicted for stealing may be convicted of embezzlement, that he cannot be convicted of stealing if there is only evidence of embezzlement. But that case was not well considered. It does not attempt to give any reason for the conclusion reached, and is not entitled to much consideration as an authority. In 1880 the Revised Code of Criminal Procedure of the State of Texas (article 714, subd. 6) provided that in a prosecution for theft a conviction might be had for 'embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code,' and it was held by the court of appeals of that State in Simco v. State, 8 Tex. App. 406, that it authorized a conviction of embezzlement under an indictment for theft, and was not violative of article 1, § 10, of the bill of rights of the constitution of the State, which provides 'that in all criminal prosecutions the accused * * * shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof.' The same conclusion was reached in the subsequent case of Whitworth v. State, 11 Tex. App. 414, in which it was said: 'The indictment in this case informed the defendant that he was called on to answer a charge of theft of money alleged to belong to one Jordan. The indictment was sufficient to apprise the defendant of the nature and cause of the action against him, and the statute informed him that the jury might acquit him of the major offense charged therein, and at the same time convict of the minor grade of the offense, which the legislature has said is included within the greater; so that we are wholly unable to see that any provision of the constitution has been impinged on or infracted by the legislative enactment. The question is one of proof, rather than one of pleading; somewhat analogous to the rule in indictments for assault with intent to murder. Now, if one be indicted for the theft of property of a certain description, the property of an individual named in the indictment, and on the trial the proof should not be sufficient to warrant a conviction for the major offense charged in the indictment, can he be heard to complain as being convicted of an inferior degree of the offense charged against him? Or can he be heard to complain that the jury has convicted of a misdemeanor, and not of felonious theft? Our conclusions are that portion of the Code found in clause 6 of article 714 of the Code of Criminal Procedure which authorizes a conviction for embezzlement under an indictment for theft must, under the authorities, be maintained by the judiciary as not in violation of that provision of the constitution which declares that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him.' Hurt, J., dissented. But in 1882 there was a change in the *personnel* of the court, and in Huntsman v. State, 12 Tex. App. 619, Whitworth's Case was expressly overruled, the court holding that the statute was violative of the constitution, and void. So that it appears that the highest criminal tribunal of that State has been upon both sides of the question. The statute in question has been in force in this State since 1855, and its constitutionality was never questioned until in State v. Harmon, 106 Mo. 635, 18 S. W. Rep. 128, and then no conclusion was reached. Its validity was recognized in the Porter, Broderick, and Owen Cases, and before it should now be held violative of the constitution and void it ought to appear to be clearly so. This court has repeatedly held that it will not declare a statute void because violative of the constitution, unless its unconstitutionality appears beyond a reasonable doubt. State v. Able, 65 Mo. 357; Ewing v. Hoblitzelle, 85 Mo. 64; Kelly v. Meeks, 87 Mo. 396. And when it is considered that the constitutionality of this statute has remaided unchallenged for over 40 years, that the crime of em-

bezzlement is a lower grade of grand larceny, that the punishment is the same for both offenses, that less proof is necessary to a conviction in a prosecution for embezzlement than in a prosecution of grand larceny, that the same kind of evidence is admissible and the same defenses available to the defendant in both cases, it cannot be said that the defendant was deprived of any right guarantied to him by the constitution, and therefore its unconstitutionality appears beyond a reasonable doubt."

MERCANTILE TRUST—LIABILITY OF BENEFICIARIES AND TRUSTEE FOR GOODS SOLD.—In Wells-Stone Mercantile Co. v. Grover, 75 N. W. Rep. 911, decided by the Supreme Court of North Dakota, it appeared that an insolvent debtor made a deed of trust in which his creditors joined. By the terms of the deed the trustee was to continue the business of the debtor as long as he should deem it for the interests of the creditors so to do. The entire management and control of the business were intrusted to him. Whenever the trustee deemed it best to discontinue the business the property was to be sold, and the claims of all the creditors signing the deed were to be paid from the proceeds; the surplus, if any, to go to the debtor. It was held that the creditors signing the deed did not thereby render themselves the real proprietors of the business, and, therefore, that they were not liable to creditors of whom the trustee had purchased goods in the prosecution of such business. The relation created by the instrument was that of trustee and beneficiary, and not that of principal and agent. The court said that ordinarily a trustee is himself personally liable on all contracts made by him as trustee, but that in exceptional cases he may, by express contract, prevent his becoming personally responsible, charging the liability on the trust fund itself, and that when this has been done the creditor may, under peculiar circumstances, proceed against the trust property, either in the hands of the trustee, or of the beneficiary himself."

NON-EXPERT OPINION EVIDENCE.

"It is no satisfaction for a witness to say that he thinks or persuadeth himself, and this for two reasons. First: because the judge is to give an absolute sentence, and for this, ought to have a more sure ground than thinking. Secondly: the witness cannot be sued for perjury."[1] This rule in regard to the admission of non-expert opinions in evidence with some exceptions was followed for many years, and it may be stated to be the rule today not so much restricted, many exceptions having been found necessary to the due administration of justice. It has been generally held that in matters more within the ordinary observation and experience of men non-experts may in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry, but such witnesses are required as far as possible to state the primary facts which support their opinion,[2] and where it does not appear but that the jury is equally capable with the witnesses of forming an opinion from the facts stated, it is improper to admit the opinions of witnesses.[3] An opinion may be given by a non-expert concerning matters with which he is specially acquainted, but which cannot be specifically described. Numerous cases illustrate this rule: Thus a witness may state his opinion that a highway was in good repair, the court holding that this is not a question for an expert altogether. "Any man of common sense of ordinary observation and experience can pronounce as satisfactorily upon such a question as the most accomplished mechanic."[4] So a witness may testify that a horse is gentle,[5] that a train was running at a certain rate of speed,[6] as to condition of the weather,[7] that a certain substance is "hard pan,"[8] that a certain liquor was whisky,[9] and a non-expert witness acquainted with the facts may give an opinion as to the sufficiency of a dam, the court saying it was a question of common sense as well as of science.[10] In a similar case a question, "You may state what effect, if any, the drainage of the wet land would have upon the public health of the community" was held proper.[11] In an action for a breach of prom-

[1] Dyer, 53 b. pl. 11 in marg. Ed. 1688.

[2] Railroad Co. v. McLendon, 63 Ala. 266; Chicago, etc. R. R. Co. v. George, 19 Ill. 510; Indianapolis v. Huffer, 30 Ind. 235; James v. State, 104 Ala. 20; Culver v. Dwight, 6 Gray (Mass.), 444; Irish v. Smith, 8 S. & R. (Pa.) 573; Reynolds, Ev. 51; Chamberlayne's Best on Ev. p. 473.

[3] Railroad Co. v. Shultz, 43 Ohio St. 270, 54 Am. Rep. 805.

[4] Alexander v. Town of Mt. Sterling, 71 Ill. 366; Clinton v. Howard, 42 Conn. 294.

[5] Sydleman v. Beckwith, 43 Conn. 9.

[6] State v. Folwell, 14 Kan. 105; Commonwealth v. Malone, 114 Mass. 295; Wadell v. N. Y. Cent. R. R. Co., 38 N. Y. S. 1009, 4 App. Div. 549; Chipman v. U. P. Ry. Co. (Utah), 41 Pac. Rep. 562.

[7] Curtis v. Chicago, etc. R. Co., 18 Wis. 312.

[8] Currier v. Boston, etc. R. Co., 34 N. H. 498.

[9] Commonwealth v. Doredican, 114 Mass. 257.

[10] Porter v. Pequonnoc, etc. Co., 17 Conn. 249.

[11] Bennett v. Meehan, 83 Ind. 566, 143 Am. Rep. 78.

ise to marry, a person accustomed to observe the mutual deportment of the parties may give in evidence his opinion upon the question, whether they were attached to each other.[12] In a Massachusetts case it was held that a non-expert might testify to the acts and appearance of another which indicate disease or disability, but could not give his opinion on the subject;[13] but in a later case the same court held that a non-expert witness might testify as to the comparative health of a person.[14] What appears to one in such cases can scarcely be different from his opinion, and the distinction between testifying to an appearance and an opinion of it is certainly a fine one.[15] And subsequently the same court arrived at the conclusion that: "Common observers having special opportunities for observation may testify to their opinions as conclusions of fact, although they are not experts if the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion, are such as men in general are capable of comprehending."[16] In all supposed statements of fact the witness really testifies to the opinion formed by the judgment upon the presentment of the senses, therefore, statement of opinion is necessarily involved in statement of fact.[17] Latent facts which are only discoverable by way of appearances more or less symptomatic of the existence of the main fact may, from their very nature, be shown by the opinion of witnesses as to the existence of such appearances or symptoms; thus a witness may testify as to whether a person appeared to be in love[18] or insane.[19] On the question of insanity, the Supreme Court of Illinois gave preference to non-expert testimony rather than that of medical experts. In his opinion, Breese, J., said: "It was said by a distinguished judge in a case before him, if there was any kind of testimony not only of no value, but even worse than that it was in his judgment that of medical experts. * * * We feel confident we will be more likely to arrive at a just estimate of the mental condition and business capacity of the testator by relying on the accordant testimony of his life-long acquaintances and neighbors with whom the testator was in frequent intercourse rather than the testimony of those medical gentlemen, and so should the jury."[20] Non-expert witnesses who have stated their observation and the facts attendant on the condition of a person before and after an alleged mental impairment, may also state their conclusions and opinions based thereon.[21] Opinions have been held admissible as to the origin of sounds,[22] the health of another,[23] the condition of another's eyesight,[24] the meaning of certain gestures or tones of voice, and to whom they apply,[25] whether a person appeared hostile or friendly.[26] In a trial for murder a witness was asked whether the hold of the defendant and the deceased was a friendly or unfriendly grasp, and his answer was admitted.[27] Whether a person appeared sad[28] or intoxicated.[29] A witness

[12] McKee v. Nelson, 4 Cowen, 355.

[13] Ashland v. Marlborough, 99 Mass. 47.

[14] Parker v. B. & H. Steamboat Co., 109 Mass. 449.

[15] Com. v. Cunningham, 104 Mass. 545; Com. v. Dorsey, 103 Mass. 412.

[16] Com. v. Sturtevant, 117 Mass. 122; Sydleman v. Beckwith, 43 Conn. 9.

[17] 1 Whar. Ev. 15.

[18] McKee v. Nelson, 4 Cowen, 355.

[19] State v. Potts, 100 N. Car. 457; Dewitt v. Barly, 17 N. Y. 340; Paine v. Aldrich, 133 N. Y. 544; Upstone v. People, 109 Ill. 169; State v. Williamson, 106 Mo. 162; McConnell v. Wildes, 153 Mass. 487; Westmore v. Sheffield, 56 Vt. 239; Fishburne v. Ferguson, 84 Va. 87; Johnson v. Culver, 116 Ind. 278; Ins. Co. v. Lathrop, 111 U. S. 612; Greenleaf, Ev. vol. 1, p. 583. *Contra*, Williams v. Lee, 47 Md. 321; Butler v. Ins. Co., 45 Iowa, 93; Estate of Brooks, 54 Cal. 471; See also Cowles v. Merchants, 140 Mass. 377; Wyman v. Gould, 47 Me. 159.

[20] Rutherford v. Morris, 77 Ill. 407; N. Y. C. & St. L. R. R. Co. v. Leubeck, 157 Ill. 595.

[21] N. Y. C. & St. L. Ry. Co. v. Luebeck, 41 N. E. Rep. 897, 157, Ill. 595; Phelps v. Com. (Ky.), 32 S. W. Rep. 470; Pflueger v. State, 46 Neb. 493, 64 N. W. Rep. 1094; Genz v. State (N. J. Sup.), 34 Atl. Rep. 816; People v. Strait, 148 N. Y. 566, 42 N. E. Rep. 1045.

[22] State v. Shinborn, 46 N. H. 497; People v. Chin Hane, 108 Cal. 597, 41 Pac. Rep. 697.

[23] Smalley v. Appleton, 70 Wis. 340; Baker v. Coleman, 35 Ala. 221; Railroad Co. v. McLendon, 63 Ala. 266; Sloan v. Ry. Co., 45 N. Y. 125; Will v. Village of Mendon (Mich.), 66 N. W. Rep. 58; Gulf, C. & S. F. Ry. Co. v. Ross (Tex. Civ. App.), 32 S. W. Rep. 730; Ft. Worth & D. C. Ry. Co. v. Hyatt, 34 S. W. Rep. 677; Keller v. Town of Gilman (Wis.), 66 N. W. Rep. 800.

[24] Adams v. People, 63 N. Y. Ct. App. 621.

[25] Leonard v. Allen, 11 Cush. (Mass.) 241; Price v. State, 34 S. W. Rep. 622.

[26] Polk v. State, 62 Ala. 237; State v. James, 31 S. Car. 218; State v. Buchler, 103 Mo. 203.

[27] Blake v. People, 73 N. Y. 586.

[28] Culver v. Dwight, 6 Gray, 44.

[29] State v. Pike, 49 N. H. 399; Aurora v. Killman, 90 Ill. 61; People v. Eastman, 14 N. Y. 562; Cook v. Ins. Co., 84 Mich. 12; Pierce v. State, 53 Ga. 365; But see Dillard v. State, 58 Miss. 368.

can state that a spot was "blood,"[30] or that a person appeared rational,[31] or looked "excited" or "scared" or "angry."[32] So a witness can testify that certain things were done "in a pleasant manner,"[33] that footprints "corresponded,"[34] or that he recognized a walk,[35] that two pieces of wood are parts of the same stick,[36] that a horse appears to be diseased in the foot,[37] or to be frightened or sulky,[38] or as to its qualities,[39] or of a person's pecuniary responsibility.[40] So also as to values and prices,[41] and as to times and distances.[42] A witness may give his opinion as to the age of a person who pleads infancy in an action on acontract where the witness has had an opportunity to observe the appearance of the person at the time the contract was made.[43] Judge Doe in a very elaborate and valuable opinion has stated that: Non-expert witnesses may give their opinions on questions of identity, resemblance, apparent condition of mind or body, intoxication, insanity, sickness, health, value, conduct and bearing, whether friendly or hostile and the like.[44] In an action to recover wages, the opinion of a witness that the plaintiff seemed to acquiesce in a proposal made to him was received.[45] And the opinion of the witness that a certain remark was made in jest, is admissible.[46] So in a prosecution under the liquor laws, that a certain person was of intemperate habits,[47] and as to intoxicating effect of certain liquor,[48] and that a certain woman looked like a white woman.[49] Plaintiff who had invented an improved cotton-gin, and had applied for letters patent therefor, contracted to sell the same to the defendants, and to assign the letters patent, when obtained, for a specified sum. The contract contained a warrant that the cottin-gin would be "equal in all respects to the best saw-gin then in use." In an action upon the contract, wherein the defendant set up a breach of warranty as a defense, it was held that the testimony of men, competent from education and experience to express an opinion as to whether plaintiff's invention was, in fact, equal to the best saw-gins, was competent; that the inquiry related to matter which was not the subject of general knowledge, but which depended upon facts, from their nature difficult, if not impossible, to be testified to, and it could only be answered by one having peculiar knowledge and skill in the use of this and other machines. It was further held, that the plaintiff, having given evidence as to the comparative merits of this and other machines, could not object to the giving of similar evidence by the defendant.[50]

So the opinions of ordinary witnesses are received in matters of size, color, weight and quality,[51] and in the estimation of time and distance,[52] as to impressions of cold or heat, light and darkness,[53] and in some cases as to the capacity and sufficiency of an object for the purpose intended,[54] and whether a certain place is safe or dangerous;[55] for instance, the opinion of a witness may be received as to whether a stock car was a dangerous place for a person to ride.[56] A witness' opinion as to the identity of a person or thing may be received in evidence,[57] and it is permissible to

[30] People v. Deacons, 109 N. Y. 374, but see Moffatt v. State (Tex.), 33 S. W. Rep. 344.

[31] People v. Lavelle, 71 Cal. 351; Elsner v. Lodge, 98 Mo. 640.

[32] State v. Houston, 78 Ala. 576; State v. Ramsey, 82 Mo. 133; Miller v. State (Ala.), 19 South. Rep. 37.

[33] Ala. Ry. Co. v. Frazier, 93 Ala. 45.

[34] Busby v. State, 77 Ala. 66; Com. v. Pope, 103 Mass. 440.

[35] Beale v. Posey, 72 Ala. 323.

[36] Com. v. Choate, 105 Mass. 451.

[37] 31 N. H. 485.

[38] 46 *Id.* 23.

[39] State v. Avery, 44 N. H. 392.

[40] Bank of Middlebury v. Rutland, 33 Vt. 414.

[41] Nellis v. McCarn, 35 Barb. (N. Y.) 115; Derby v. Gallup, 5 Minn. 119; Brady v. Brady, 8 Allen (Mass.), 101; McDonald v. Christie, 42 Barb. (N. Y.) 36.

[42] Campbell v. State, 23 Ala. 44.

[43] Benson v. McFadden, 50 Ind. 431; see also Com. v. O'Brien, 134 Mass. 198; State v. Grubb, 55 Kan. 678, 41 Pac. Rep. 951.

[44] Doe, J. in State v. Pike, 49 N. H. 399. See also Miller v. Dill (Ind. Sup.), 49 N. E. Rep. 272.

[45] Bradley v. Salmon Falls Mfg. Co., 30 N. H. 487.

[46] Ray v. State, 50 Ala. 104.

[47] Smith v. State, 55 Ala. 1; Tatum v. State, 63 Ala. 150.

[48] State v. Miller, 53 Iowa, 84.

[49] Moore v. State, 7 Tex. App. 608.

[50] Scattergood v. Wood, 79 N. Y. 263; Off., 14 Hun (N. Y.), 269.

[51] Bass Furnace Co. v. Glasscock, 82 Ala. 452.

[52] Com. v. Sturtevant, 117 Mass. 133.

[53] Kelley v. Richardson, 67 Mich. 430.

[54] McPherson v. St. Louis, etc. R. R. Co., 97 Mo. 253.

[55] Couch v. Charlotte, etc. R. R. Co., 22 S. Car. 557; Way v. Ill. Cent. R. R. Co., 40 Iowa, 341; King v. Missouri, etc. R. Co. (Mo.), 11 S. W. Rep. 563; Topeka v. Sherwood, 39 Kan. 690.

[56] Lawson v. Chicago, etc. R. R. Co., 64 Wis. 447. See also Weeks v. Town of Lindon, 54 Vt. 638; Kelley v. Fon du Lac, 31 Wis. 179; Brown v. Cape Girardeau, etc. Co., 89 Mo. 152. As to questions of reasonable safety, see Schwander v. Birge, 46 Hun (N. Y.), 66; Taylor v. Town of Monroe, 43 Conn. 36.

[57] Cham. Best Ev., p. 472; Greenleaf Ev., § 440; Com. v. Williams, 105 Mass. 62; Com. v. Sturtivant, 117 *Ib.*

allow the witness to state circumstances relative to the question of identity, thus confirming the probability that his judgment is correct.[58] "In the identification of person," says Parke, B., "you compare in your mind the man you have seen with the man you see at trial. The same rule belongs to every species of identification."[59] The resemblance between individuals is often very close, and numerous mistakes have been made. A well-known man once narrowly escaped conviction for highway robbery on account of his extraordinary resemblance to a notorious highwayman;[60] and Sir Thomas Davenport swore positively to the identity of two men whom he charged with robbing him in the day time. An *alibi* was proved, and the real robbers were eventually caught, when Sir Thomas at once acknowledged that he had been mistaken.[61] On a trial for burglary, one who saw two men leaving the burglarized house shortly after the offense was committed may, after describing them, give an opinion that one resembled defendant.[62] On a trial for assault with intent to murder, where it was shown that defendant spoke to prosecutor both before and after the shot, evidence that witness could recognize him by his voice was admissible;[63] but testimony of an officer who arrested defendant, that he did so from the description given him by the person upon whom the defendant was charged with passing forged checks, was held inadmissible to identify defendant.[64] Where matter of fact is distinguishable from matter of opinion, the facts and not the opinion must be stated. Perhaps the only limitation on evidence of this nature is that the witness must not be allowed to necessarily invade the province of the jury and substitute his opinion for theirs.[65]

Whether a non-expert is qualified to give an opinion is for the court,[66] and it must decide whether the subject matter to which the testimony relates is of such a nature as to warrant the introduction of opinion evidence from non-expert witnesses, and in deciding that question, the court will be governed by the principles above mentioned, *i. e.*, a witness may state his opinion in evidence when the primary facts on which it is founded are of such a nature as prevents their adequate reproduction or description to the jury, so as to enable another than the actual observer to form an intelligent conclusion from them;[67] and when the facts upon which the witness is to express his opinion are of such a nature that men in general are capable of comprehending and understanding them,[68] and in some cases where it is impossible to describe the facts, as, for instance, in questions relating to identity of persons,[69] but generally opinions, like other testimony, are competent in the class of cases in which they are the best testimony.[70] It may be said that it is only in cases where a previous habit or study is essential to the formation of the opinion sought to be put in evidence that all but experts are excluded.[71] A non-expert witness cannot give his opinion as to whether a piece of paper looks as if it had been used as a gun wadding, if the paper is produced in court,[72] nor as to how far a conversation said to have been carried on in an ordinary tone, but not heard by the witness, could be heard,[73] nor what is the highest part of a hill,[74] and a witness will not be allowed to testify to resemblance of child to his putative father,[75] or to give his opinion as to whether the accused can or cannot control his appetite for intoxicating liquor.[76] It was held error to admit in evidence the opinion of the city attorney as to the construction of a contract between

122. See Com. v. Mainehan, 140 Mass. 463, 5 N. E. Rep. 259.

58 Com. v. Kennedy (Mass.), 48 N. E. Rep. 770.

59 Freyer v. Gathercole, 13 Jur. 542.

60 Beck's Med. Jur. 408.

61 R. v. Byrne, 28 How. St. Tr. 819. See also Male 3 Benth. Jud. Ev. 255; Shufflebottom v. Allday, Exch. M. 1856. As to mistaken identity of things, Burnett Crim. Law of Scot. 558; Com. v. Flynn, 165 Mass. 53; State v. Lytle, 23 S. E. Rep. 476, 117 N. Car. 799.

62 State v. Powers, 32 S. W. Rep. 984, 130 Mo. 475.

63 Givins v. State (Tex.), 34 S. W. Rep. 636.

64 Mallory v. State (Tex.), 36 S. W. Rep. 751.

65 Kirby v. Ins. Co., 9 Lea (Tenn.), 142; Hill v. R. R. Co., 55 Me. 438; Mellor v. Utica, 48 Wis. 457; Ferguson v. Hubbel, 97 N. Y. 507; Smith v. Hickenbottom, 57 Iowa, 733; Stowe v. Bishop, 58 Vt. 498; Brown v. State, 55 Ark. 593; Leitensdorfer v. King, 7 Colo. 436.

66 Tucker v. Mass. Cent. R. R., 118 Mass. 546.

67 Uahn v. City of Ottumwa, 60 Iowa, 429; State v. Baldwin, 36 Kan. 2; Railroad v. Schultz, 43 Ohio St. 270; Cavendish v. Troy, 41 Vt. 108; City of Parsons v. Lindsay, 26 Kan. 426.

68 Commonwealth v. Sturtevant, 117 Mass. 122; Rogers Exp. Tes., p. 8.

69 Sydleman v. Beckwith, 43 Conn. 9.

70 State v. Pike, 49 N. H. 399.

71 Spear v. Drainage Commrs., 113 Ill. 632.

72 People v. Manke, 78 N. Y. 611.

73 Hardenburg v. Cockroft, 5 Daly N. Y. C. C. P. 79.

74 Hovey v. Sawyer, 5 Allen (Mass.), 554.

75 Eddy v. Gray, 4 Ala. 435; Jones v. Jones, 45 Md. 144; Keniston v. Rowe, 16 Me. 38.

76 Goodwin v. State, 96 Ind. 550.

the city and a water company on which the suit was based;[77] and in ejectment, after defendant testified that the land had been held by him as "pre-emption lands," the opinion of another witness as to the meaning of the term as used by defendant was incompetent.[78] A witness cannot give his opinion that premises were rented for the purpose of keeping a gambling house, but must confine his answer to the words or acts of the parties when making the lease, leaving the conclusion to be drawn by the court or jury.[79] Nor can a witness state his opinion as to the public utility of a proposed change in a highway,[80] or on an issue of ownership of personal property.[81] The opinions of attendants or relatives, who are non-experts, as to the cause of a person's death, are not admissible,[82] and a witness cannot testify that a custom is so general and uniform as to create a presumption of the knowledge of it,[83] or that defendant did not object to a bill presented to him.[84] The asking of a witness "whether you did sell him these notes or not," the sale being the point in issue, is objectionable as calling for a conclusion.[85] In a criminal case, a witness was asked, on cross-examination: "In the conversation you had with defendant, did he not cross himself?" to which the witness answered "yes," and it was held that the testimony was improperly admitted as being the opinion of the witness.[86] Non-expert witnesses may not testify to the effect of wounds or injuries,[87] but any one, though not an expert, may testify that one looked ill or pale or appeared to be suffering pain after an alleged injury.[88] Mere opinion as to the amount of damages are not ordinarily to be received,[89] nor are mere opinions admissible respecting the value of property in common use concerning which no particular study is required or skill possessed.[90] In a recent case in Alabama, the court presented the following convincing argument in support of the admission of evidence that the defendant "looked frightened" when he saw the sheriff. Haralson, J., said: "The sheriff testified that as he was going out to the place where Williams was killed the day following the night he was killed, he met defendant and another negro inside the corporate limits of Greenville, and that defendant looked frightened when he saw him. To this last expression, which is italicized, the defendant objected, and excepted to the ruling of the court in admitting it. Such expressions as 'she appeared to be healthy;' 'the accused appeared to be mad;' that a person 'was sick, had fever or was pregnant;' 'plaintiff seemed to be suffering;' 'she was not able to return home;' 'she looked bad, and the left wrist of plaintiff looked like the bone had slipped off the joint;' 'that the pieces of jugs found in the debris of the burned gin house looked like they had been burned;' and such like expressions, have been held to be admissible as statements of what are called 'collective facts.' Railroad Co. v. McLendon, 63 Ala. 266, 275; Carney v. State, 79 Ala. 14, 17; Jenkins v. State, 82 Ala. 28, 2 South. Rep. 150; James v. State, 104 Ala. 20, 16 South. Rep. 94; Miller v. State (Ala.), 19 South. Rep. 37. The principle upon which such opinions are admissible as evidence is very fully stated in Carney v. State, *supra*, as follows: 'Human emotions and human passions are not, in themselves, physical entities susceptible of proof as such. Like the atmosphere, the wind and some acknowledged forces of nature, they are seen only in the effects they produce. Pleasure, pain, joy, sorrow, peace, restlessness, happiness, misery, friendship, enmity, anger, are of this class. So tenderness, sympathy, rudeness, harshness, contempt, disgust, the outcrop of emotional *status* cannot, in their constitution, be made so far physical facts or entities, as to become the subject of intelligent word description. They are proved by what is called "opinion evidence." Not the

[77] Crosby v. City Council of M. (Ala.), 18 South. Rep. 723.

[78] Doe v. Beck (Ala.), 19 South. Rep. 802.

[79] Ryan v. Potwin, 60 Ill. App. 637.

[80] Johnson v. Anderson, 42 N. E. Rep. 815, 143 Ind. 493.

[81] Brown v. Cloud County Bank, 42 Pac. Rep. 593, 2 Kan. App. 352.

[82] Am. Acc. Co. v. Fidler's Admx. (Ky.), 35 S. W. Rep. 905.

[83] Ford v. St. L., K. & N. W. R. Co., 63 Mo. App. 133.

[84] Harrison v. Trickett, 57 Ill. App. 515.

[85] Ward v. Dickson (Iowa), 65 N. W. Rep. 997.

[86] Joyce v. State (Ark.), 36 S. W. Rep. 908.

[87] Rush v. State, 61 Ala. 89; People v. Millard, 53 Mich. 63.

[88] Hall v. City of Austin, 75 N. W. Rep. 1121.

[89] Harger v. Edmonds, 4 Barb. (S. Car.), 256; Giles v. O'Tool, *Id.* 261; Walker v. Protection Ins. Co., 16 Shepl. 317; Ross v. Stockwell (Ind. App.), 49 N. E. Rep. 50.

[90] Robertson v. Stark, 15 N. H. 109; Rochester v. Chester, 3 N. H. 349. And see also Whipple v. Walpole, 10 N. H. 130, where this rule is expounded.

mere unreasoning opinion, or arbitrary conclusion of the witness, but his opinion based on experience and observation of the conduct, conversation and facial expression of others in similar emotional conditions. Facial expressions and vocal intonation are so legible, as that brutes comprehend them; and yet human language has no terms by which they can be dissected and explained in detail,' etc. Again, as to the admissibility of such evidence, Mr. Wharton says: 'The true line of distinction is this: An inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent of a specification of the facts,' or a shorthand rendering of them, subject to cross-examination as to the facts on which the inference is based. 1 Whart. Ev., § 510, and authorities cited.''[91] In the celebrated divorce case of Carter v. Carter, the Illinois Supreme Court held that a witness who is not an expert may give his conclusions and the results of his observation, when the matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness, and that it was not error to permit a witness to give his opinion from sounds, noises and conversation heard in an adjoining room, that an act of adultery took place.[92] There are innumerable instances of what has been held to be exceptions to the rule above given, and cases collected will be sufficient to illustrate the principle upon which the opinions of non-expert witnesses are admitted. It has been said the rule allowing the admission of opinions should not be extended;[93] but it seems to be the tendency of the courts to admit opinion evidence under the protection of liberal cross-examination, which is sufficient protection against its supposed harmful effects.

MORTON JOHN STEVENSON.

Chicago, Ill.

[91] Thornton v. State, 21 South. Rep. 356.
[92] Teerpenning v. Corn Ex. Ins. Co., 43 N. Y. 279.
[93] Carter v. Carter, 152 Ill. 434.

PRIVILEGED COMMUNICATIONS — APPEAL — PRESUMPTIONS.

OWENS v. FRANK.

Supreme Court of Wyoming, June 1, 1898.

1. Statements made in confidence to a fellow member of the Masonic order are not privileged communications, protected from disclosure by a witness.

2. Where evidence is erroneously rejected on the sole ground of incompetency, it is presumed to have been material, even though the record does not disclose the substantial nature of the conversation.

POTTER, C. J.: This was an action to recover possession of certain specific personal property, which the sheriff held under attachment sued out at the instance of certain creditors of one Robert S. Douglas, who had formerly been engaged in the mercantile business. Douglas had sold out his entire stock (including the attached property), fixtures and accounts to the defendant in error; and thereafter the goods were attached as the property of Douglas, the sale being assailed, on the trial, as fraudulent and void, and as having been made to protect the debtor vendor. The cause was tried to the court, and judgment was rendered for the defendant in error, the plaintiff below, the findings being that he was the owner and entitled to the immediate possession of the property.

One assignment of error only is insisted on, viz., that the trial court erred in ruling that a certain witness produced by the plaintiff in error was not obliged to relate a conversation which had occurred between the witness and defendant in error in reference to the sale by Douglas to him, the stock sold and the financial condition of Douglas. After admitting that he had had a conversation of that character at about the time of the sale, the witness answered that he did not feel at liberty to relate it, for the reason that he received the communication in confidence as a Mason. The court asked him if the conversation was confidential, if it had been given and received in confidence, and if relating it would violate his obligation as a Mason, all of which questions were answered in the affirmative; and thereupon it was ruled that the witness would not be obliged to testify respecting it. Upon request of counsel who had offered the witness, the defendant in error, in open court, refused to release witness from his obligation not to divulge what had been said in the course of the conversation. The ruling of the court was excepted to. The error assigned involves the question whether a witness may refuse to answer a material question in relation to a material conversation on the ground that, having been given and received as a Mason, it is a privileged communication. The question at issue on the trial was whether, as against existing creditors of Douglas, his sale to Frank was fraudulent or not. The witness testified that in the conversation the financial condition of Douglas was discussed, and that he thought the matter of the sale was mentioned, although he professed some lack of recollection as to the matters which entered into the conversation. Counsel for defendant in error does not discuss the question as to whether the conversation was privileged or not, nor does he cite any authority in support of the ruling of the court; but it is contended, as there was no offer of proof, or statement of what fact the party producing him expected to prove by the witness,

the error, if any, will not be regarded by this court, nor the conversation, whatever it may have been, assumed to have been material.

It is perfectly clear that at common law the conversation would not have been privileged. 1 Greenl. Ev. (15th Ed.) §§ 236-248; Hoffman v. Smith, 1 Caines, 157, 159. In the case cited, the court said, in the course of the opinion: "Nor was there any weight in the objection to the competency of Mr. Troup's testimony, his information being received in the character of a friend and not in that of counsel." In Greenleaf, at section 248, the author says that the protection is not extended "to confidential friends, clerks, bankers or stewards, except as to matters which the employer himself would not be obliged to disclose." Neither does the statute include such a conversation among privileged communications, although the privilege is extended to certain communications, which were not entitled to that protection at common law. Rev. St. 1887, § 2589. The ruling of the court was therefore erroneous. However binding an obligation may be, as between members of the same society, secret or otherwise, not to divulge to others that which may be confidentially communicated to them, such an obligation must be understood to be subject to the laws of the country, and, doubtless, the societies themselves recognize that such a limitation attaches to the obligation; and therefore it cannot be said that the obligation is violated when the disclosure is compelled in a court of justice in the course of the administration of the laws. Should the error be disregarded in the absence of a statement showing what was expected to be proven by the witness? A similar question was decided by this court in the case of McGinness v. State, 4 Wyo. 115, 31 Pac. Rep. 978, and the principle there announced seems applicable to the circumstances in this case. It was held in that case that, if the testimony of a witness has been rejected upon the sole ground of his incompetency, it will be presumed that the testimony of such witness would have been material, without any statement to that effect in the record, and without an offer having been made of what it was expected to prove by him. In that case the witness had been rejected by the trial court on the ground that, as a co-defendant in a criminal case, he was incompetent. The reason underlying that rule is that the question in such case is whether the witness shall be heard at all, though his testimony be ever so relevant or important. In the case at bar the trial court did not regard as at all important whether the conversation was relevant or material, or whether in itself it would be competent upon any issue presented in the case; but the ruling was that, notwithstanding its materiality or competency, the witness would not be obliged to relate it. It is clear that no offer of proof could have affected the ruling of the court, or the reason which prompted it. It must therefore, on the authority of McGinness v. State, *supra*, be presumed that the excluded testimony would have been material. The record, however, is not entirely silent respecting the character of the conversation as understood by the party attempting to establish it. In addition to the subject of it, which appeared by the testimony of the witness in question, Mr. Frank was asked on cross-examination if he had not stated to such witness, "You know Bob's condition [meaning Robert S. Douglas] as well as I do, and something will have to be done," or words to that effect; and Mr. Frank, in answer thereto, testified that he had no recollection of anything of the kind. On the ground, however, that the testimony was excluded solely for the reason that the conversation was privileged, and as enough appears to indicate that it referred to a sale which was in controversy, and the financial condition of the debtor making the sale, we think it must be presumed that it would have been material without any statement of what it was claimed would be elicited thereby. For the error in the ruling excluding the testimony, the judgment must be reversed, and a new trial ordered. Reversed.

CORN and KNIGHT, JJ., concur.

NOTE. — *Communications Not Privileged.* — The rule that confidential communications between husband and wife, attorney and client, priest and parishioner, etc., are privileged is one of the elementary rules of evidence. The propriety and necessity of such a rule is apparent. The husband and wife should feel free to disclose any matters to each other without fear of legal or other investigation to the end that the relation may not be in the least strained or that either be always on the guard lest some word may fall which might be proven in a legal proceeding by the evidence of the other. The rule is equally as necessary in the case of attorney and client. For, unless the client may make full disclosures to his attorney, the latter may be left in the dark as to material points in the case which he may not be fortified against unless he can obtain the facts from his client. The rule is truly a wholesome one, and is always respected by the courts whether the attorney be actually paid for his services or advice or not, as the privileged character of the communication depends upon the relation of attorney and client, and this relation may well exist whether the attorney be paid much or little, or whether he receive any pay or not. The rule is extended to priest and parishioner in order to protect those whose religious belief impels them to make full and unconditional disclosures to their priest to the end that they may receive his absolution. But the rule is not without limit, and the limit is usually marked by the line of necessity, beyond which it is never extended. The ruling of the principal case that communications from one mason to another in masonic confidence are not privileged is no doubt correct, however greatly one member of that or any other like order might object to making public from the witness stand the information thus had. The communications between a physician and his patient to the extent that they relate to the ailment and are necessary to a proper understanding of the symptoms and condition of the patient are always deemed privileged. This is the common law which in Michigan has been practically reduced to statutory form by which persons authorized to practice medicine and surgery come within the rule. But it is held in that State

that communications between a dentist and his patient are not privileged. People v. De France, 104 Mich. 563. This seems to be the only case deciding this very point. The learned court refer to the case of State v. Fisher, 119 Mo. 344, as being in point. But in the Missouri case it was only held that a dentist was not a person exercising the functions of a practitioner of medicine, and not therefore exempt from jury service. In the Missouri case three judges dissented, and it must be confessed that the reasoning of the dissenting judges seems the most satisfactory. It is true a dentist is not a doctor of medicine in the general sense of that term as commonly accepted. Neither is an occulist, an aurist or any other similar "ist," strictly speaking. The occulist takes a general course of medicine, it is true, but as a rule, he pays just as little attention to general practice as does the dentist. He treats the eye and ear, the dentist the teeth and gums. The occulist must have a general idea of the knowledge of medicine. So must the dentist, and often dentists take the M. D. degree in addition to that of D. D. S. The dentist could not safely pull a tooth for a woman in pregnancy. In order to enable him to operate successfully and intelligently, he often must ascertain this fact, as well as other physical conditions to the end that the operation, whether it be merely to fill a tooth, lance the gums, or extract a tooth, the doing of which is sometimes attended with real danger to the patient even when well. In many disordered physical conditions operative dentistry is attended with more or less serious results. Often these ailments may be as successfully treated by the dentist as by a surgeon or ordinary doctor in the general sense of the term. The progressive dentist must necessarily attain a certain degree of knowledge of medicines in order to pass the examination usually required of dentists before they are permitted to practice under the various State laws. The occulist practically confines his acute knowledge of medicine to those drugs used in treating the eye. He belongs to a branch of medicine and is freely accorded such recognition. The contention of the American Dental Association and of the Southern Dental Association, the two leading dental organizations in America, is that dentistry is also a branch of medicine. This claim is being pressed more and more all the time, it seems entirely consistent with reason, and the tendency to recognize it by the medical profession seems all the time growing. The reason of the privilege between a doctor and a patient is, the doctor cannot intelligently prescribe unless he knows the condition and all the symptoms. The occulist may have to ascertain some condition of the stomach or other organ in order to intelligently treat the eyes. The dentist, upon the same principle, must likewise investigate other matters than the mere necessity of dental work. This is imperatively necessary in many cases in order to enable the dentist to intelligently treat, fill, or extract a tooth, or perform any other dental operation. The information is necessary for the good of the patient and the intelligent and scientific work of the dentist. The reason of the law is uniformly the same. The law should be the same to conform to reason. Where the owner of stock in a national bank had, in reponse to a letter from a bank examiner marked "confidential," acknowledged the transfer of his stock, his declaration to the examiner was properly held not to be privileged. Cox v. Montague, 78 Fed. Rep. 845. So, upon the same principle, a United States internal revenue officer cannot claim, as privileged, an application to him of a person wishing to engage in the retail liquor business, and such officer may be required, in a State court, to give evidence of such fact. *In re* Hirsch, 74 Fed. Rep. 928. And, as the communications between masons and members of other orders are not privileged, so, of course, are not the most confidential communications between friends, no matter how intimate the friendship, nor how sacred, from the standpoint of friendship or honor, the information be. It is not for this reason privileged, and to carry the rule thus far might seal the lips of witnesses to an extent ruinous to litigants. Wilson v. Rastell, 4 T. R. 753. And even in the case of communications between attorney and client, while matters revealed to an attorney for the purpose of enabling him to correctly state the law to one who asks his advice, though no pay is asked or tendered (Wade v. Ridley, 87 Me. 368), yet information made known to an attorney casually or otherwise than as necessary for him to be enabled to intelligently give his opinion on a point of law, is no more sacred than if intrusted to a stranger. Home Fire Ins. Co. v. Berg, 46 Neb. 600; George v. Silva, 68 Cal. 272; Ferguson v. McBean, 91 Cal. 63. So, too, communications though made to an attorney in professional confidence, and for the purpose of enabling him to correctly understand the law of the point inquired of him, are not privileged when made to the attorney in the presence of others. Therefore, where an attorney acts in any matter for two parties, having diverse interests, he may be compelled by either to disclose the declarations made to him by the other when all were present. Hanlon v. Dougherty, 109 Ind. 37; Griffin v. Griffin, 125 Ill. 430; *In re* Bauer's Estate, 79 Cal. 304; Carey v. Carey, 108 N. Car. 267; Colt v. McConnell, 116 Ind. 249; Michael v. Foil, 100 N. Car. 178; Hurlburt v. Hurlburt, 128 N. Y. 420; Hughes v. Boone, 102 N. Car. 137; Appeal of Goodwin Gas Stove & M. Co., 117 Pa. St. 514; Murphy v. Waterhouse, 113 Cal. 467. And where a person upon approaching an attorney for advice about a case was stopped by the attorney for the reason that he had been retained by the opposing side nevertheless, after such caution by the attorney, made certain statements concerning the facts of the case, these were held not privileged. Plano Mfg. Co. v. Frawley, 68 Wis. 577. And see, to like effect, Clay v. Tyson, 19 Neb. 530. And while an attorney may be compelled to testify against his client, he may be required to testify as to any fact he may know which he did not learn in his professional capacity. The fact that the attorney may be retained, simply, does not seal his lips from testifying against his client. Milan v. State, 24 Ark. 346; Farley v. Peebles, 50 Neb. 723; Lloyd v. Davis, 2 Ind. App. 170. Nor is the fact of the relationship of attorney and client privileged. Chirac v. Reinicker, 11 Wheat. 280. An attorney may be compelled to testify to statements made by his client in his presence, when made to others and not addressed to the attorney in his professional capacity and for his professional information. Shaffer v. Mink, 60 Iowa, 754. And see Tucker v. Finch, 66 Wis. 17. The statements of a client to his counsel may be testified to by others who heard the same. Perry v. State (Idaho), 38 Pac. Rep. 655; People v. Buchanan, 145 N. Y. 1. Or by the attorney when made to him publicly and in the presence of others, for in such a case the idea of confidence does not exist, and there is nothing to call the privilege into use. Dueser v. Walkup, 43 Mo. App. 625. And, rigid as is the rule protecting the confidential character of communications between attorney and client from the publicity of the witness stand, an attorney may be compelled to testify as to facts confided to him by his client, when the aim and object of the client in seeking the legal information

and advice is to do an unlawful thing or violate the criminal laws. The law will not lend its aid in schemes or efforts to do that which is unlawful. Hickman v. Green (Mo.), 22 S. W. Rep. 455; Taylor v. Evans (Tex. Civ. App.), 29 S. W. Rep. 172; Hamil v. England, 50 Mo. App. 338. Communications to an attorney, made for the purpose of being by him communicated to another, or otherwise made public, are not, of course, within the rule of privilege. Bruce v. Osgood, 113 Ind. 360. And communications to any person, other than a regularly licensed lawyer, though made for the purpose of eliciting legal information and advice, and because the party has confidence in the legal learning of the person to whom the facts are thus confided, are not privileged. Dierstein v. Schubkagel, 131 Pa. St. 46. In this case, the communication was made to a law student for the purpose of obtaining legal information and guidance. See, to same effect, Barnes v. Harris, 7 Cush. (Mass.) 76. And a letter written by a husband to his wife, while it would be privileged, if sent without being opened by another, yet is not privileged where intrusted to a stranger, and by him opened. People v. Hays, 140 N. Y. 484. Communications between husband and wife, which take place after the marriage has been dissolved, are not privileged. The confidential relation between the parties has then been severed, and ceases to exist. The reason for the rule thus ceasing, the law ceases with it. Scroggin v. Holland, 16 Mo. 419; Stein v. Weidman's Admr., 20 Mo. 17; Long v. State, 86 Ala. 36; Mercer v. Patterson, 41 Ind. 440; French v. Wade, 35 Kan. 391. The wife may even testify in a prosecution against the husband for an assault and battery upon, or injury to, her person. The confidential character of the relation between husband and wife cannot be invoked to defeat the testimony of the wife in these cases. This is an exception to the rule, made necessary in order to punish the husband for the crime of physical violence to his wife, a thing which would be difficult, in most cases, but for the exception. This wholesome exception to the general rule has been recognized from early times. 1 East, P. C. 257; Rex v. Azire, 1 Str. 633; Lord Audley's Case, 3 How. St. Tr. 402, 413; Stein v. Bowman, 13 Pet. 209; Mills v. United States, 1 Pin. (Wis.) 73; United States v. Jones, 32 Fed. Rep. 569; Turner v. State, 60 Miss. 351; People v. Sebring, 66 Mich. 705; Scott v. Commonwealth, 94 Ky. 511; State v. Pain, 48 La. Ann. 311; State v. Willis, 119 Mo. 485; State v. Kenyon, 18 R. I. 217.

W. C. RODGERS.

HUMORS OF THE LAW.

"It strikes me, Mr. Brief," said Mr. Dogway, "that your charge of $750 for this opinion is pretty steep."

"No doubt," said Mr. Brief. "But you see, Dogway, when you come and ask me for an opinion which violates all my convictions, you've got to pay not only for your law, but for my conscience."

Lawyer.—"Madam, I cannot bring your suit until you have acquired a residence here."

Client.—"But I acquired a residence here two years ago. Must I do it over again every time I want a divorce?"

Lawyer.—You have an excellent case, sir."

Client.—"But a friend of mind said he had an exactly similar case, and you were the lawyer on the other side, and you beat him."

Lawyer.—"Yes, I remember that; but I will see that no such game is played this time."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADVERSE POSSESSION—Vendee under Bond for Deed.—As against a plaintiff in an action of ejectment, who has shown title in himself, a valid prescription is not established in favor of the defendant when it appears that the latter purchased and entered upon the land in dispute with knowledge that his vendor held solely under a bond for title made by the plaintiff, to whom a portion only of the purchase money had been paid, and, with this knowledge, accepted from such vendor an obligation binding the latter to make title.—BROWN V. HUEY, Ga., 30 S. E. Rep. 429.

2. APPEARANCE—Recital in Judgment.—Recital, in entry of judgment on verdict, of appearance of the parties, cannot be disputed on motion to set aside the judgment.—PERRY V. KING, Ala., 23 South. Rep. 783.

3. ARBITRATION AND AWARD — Burden of Proof.—To sustain an action on an award, the burden of proof is on plaintiff to establish that the parties agreed on a submission of matters in dispute to arbitrators, and to abide by their award, and that the arbitrators were chosen in the way agreed on, and actually made the award alleged in conformity with the agreement of submission.—FOOKS V. LAWSON, Del., 40 Atl. Rep. 661.

4. ASSIGNMENT FOR CREDITORS — Election.—One rejects the benefit of an assignment giving him and others preferences by attaching the goods conveyed, and prosecuting the suit to adverse judgment, though advised by counsel to take the proceedings as a prosecution; so that he cannot afterwards claim the preference.—ADLER-GOLDMAN COMMISSION CO. V. PEOPLE'S BANK, Ark., 46 S. W. Rep. 536.

5. ATTORNEY—Amicus Curiæ.—An attorney, though not employed in a cause pending in the appellate court, has the right to appear in behalf of a client not a party to the suit, or in his own behalf as *amicus curiæ*, and to have the court pass on the *bona fides* of the suit.—WARD V. ALSUP, Tenn., 46 S. W. Rep. 573.

6. BANKS—Distinguishment from Bill of Exchange.—An instrument drawn by the cashier of a national bank in California upon a national bank in New York, in the

following form: "Pay to the order of—, ——dollars," —held to be a check, not a bill of exchange.—BOWEN v. NEEDLES NAT. BANK, U. S. C. C., S. D. (Cal.), 87 Fed. Rep. 480.

7. BANKS—Forged Draft.—A bank which pays a forged draft purporting to be drawn by a regular customer, in the hands of an innocent purchaser for value who is without negligence, cannot recover the payment thus made, when it discovers the forgery.—MOODY v. FIRST NAT. BANK OF WACO, Tex., 46 S. W. Rep. 660.

8. BANKS—President—Hiring an Attorney.—The president of a bank has no *ex officio* power to bind it for the services of an attorney, and unless he has been empowered to hire an attorney under its by-laws, as authorized by Civ. Code, § 303, or his contract for an attorney's services was authorized by resolution of the directors, or ratified or sanctioned by their words or conduct, the bank is not liable therefor.—PACIFIC BANK v. STONE, Cal., 53 Pac. Rep. 634.

9. BENEVOLENT SOCIETY—Benefit Insurance—Assessments.—A mutual insurance society cannot defeat a recovery on a certificate issued by it on the ground that the holder has been suspended for non-payment of an assessment, without showing that the assessment was regularly made, and that his membership was subject to be so assessed.—STEWART v. GRAND LODGE, A. O. U. W., Tenn., 46 S. W. Rep. 579.

10. BILLS AND NOTES — Waiver of Demand.—An indorser of a note waiving notice and protest thereby waives demand.—TIMBERLAKE v. THAYER, Miss., 23 South. Rep. 767.

11. BUILDING AND LOAN ASSOCIATIONS—Charters—Usury.—A building association was organized under a charter granted by a corporation court. By Laws 1895-96, p. 537, § 5, a new charter was created adopting former by-laws not inconsistent, and providing that all contracts previously made between the company and its members under its former by-laws and charter, and not incompatible with the new charter, should be validated and confirmed. Held, that the legislature had power to, and did in granting the new charter, confirm and validate previous contracts which were usurious under the first charter, for the reason that such charter was granted by a court which has no power to permit loans savoring of usury.—BOSANG v. IRON BELT BUILDING & LOAN ASSN., Va., 30 S. E. Rep. 440.

12. CARRIERS—Injury to Passenger—Presumptions.—When a passenger in charge of a common carrier shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by a high degree of care, the jury have the right to infer negligence attributable to the carrier, unless the carrier proves that due care was exercised.—WHALEN v. CONSOLIDATED TRACTION CO., N. J., 40 Atl. Rep. 645.

13. CARRIERS OF GOODS—Contract Limiting Liability.—A clause limiting the liability of the carrier impressed in red ink upon one corner of the paper upon which the freight receipt is printed in black ink, and at right angles to the text of the receipt, is no part of the contract, unless so brought to the knowledge of the shipper as to imply his assent thereto on his acceptance of the receipt.—NEW YORK, ETC. R. CO. v. SAYLES, U. S. C. C. of App., Second Circuit, 87 Fed. Rep. 444.

14. CARRIERS OF GOODS — Negligence.—In an action against a carrier to recover for the loss of goods received under a contract exempting it from all liability except negligence, the burden of proving that the loss was caused without negligence is on the carrier.—LOUISVILLE & N. R. CO. v. COWHERD, Ala., 23 South. Rep. 793.

15. CARRIERS OF GOODS—Unjust Discrimination—Penalties.—Rev. St. 1895, art. 4575, providing that, if any railroad subject to the act unjustly discriminates against a person, it shall be liable to the one injured thereby for a certain penalty, is not applicable to discriminations as to the delivery of freight shipped from another State; article 4580 providing that the act shall apply to and affect only the transportation of freight and cars "between points within the State."—FIELDER v. MISSOURI, K. & T. RY. CO. OF TEXAS, Tex., 46 S. W. Rep. 633.

16. CARRIERS OF PASSENGERS—Exemplary Damages.—Proof of asperities in colloquy between the conductor of a railway train and a passenger who resists the enforcement in good faith of a rule of the railway company, which asperities were induced by the behavior and language of the passenger, is not sufficient to justify the assessment of exemplary damages against the railway company.—BULLOCK v. DELAWARE, ETC. R. CO., N. J., 40 Atl. Rep. 650.

17. CARRIERS OF PASSENGERS—Return Ticket.—A person purchasing a return ticket from a station porter, who was frequently in charge of the ticket office, with the knowledge of the ticket agent, on an agreement that a certain train should stop at that place, is entitled to rely on his authority to make the agreement, and the company will be bound thereby.—GULF, ETC. RY. CO. v. MOORMAN, Tex., 46 S. W. Rep. 662.

18. CONSTITUTIONAL LAW—State Taxation—Interstate Commerce.—The revenue law of Tennessee of 1897 (chapter 1), imposing upon all merchants an "*ad valorem* tax upon the capital invested in their business equal to that levied upon taxible property," and which provides that the amount assessed against the merchant shall not be less than the average of his stock during the preceding year, to be ascertained by adding together the highest and lowest amounts of stock on hand at any time, and dividing the sum by 2, is not a tax upon the goods, and not an interference with interstate commerce.—OLIVER FINNEY GROCERY CO. v. SPEED, U. S. C. C., W. D. (Tenn.), 87 Fed. Rep. 408.

19. CONTRACT — Construction.—A contract that complainant street-railway company should construct a track, and bear all expense of repairing it, and that defendant, for running it, should pay annually 10 per cent. of half the original cost of the part it used, so long as the use continued, having been made when both parties used horse cars, does not contemplate a change to steam power, so that, such change being made, requiring a heavier track, four times as expensive, use thereof cannot be had for such rent.—HIGHLAND AVE. & BELT R. CO. v. BIRMINGHAM UNION RY. CO., Ala., 23 South. Rep. 785.

20. CONTRACTS—Filing — Who Are Contractors.—A contract to convert ice works into a new system of ice making, and to furnish certain material therefor, is not within Code Civ. Proc. § 1183, providing that contracts for work between an owner and a contractor in excess of $1,000 are void unless in writing and filed in the recorder's office, since the contract must be considered as one for materials, and not for work except as an incident.—BRYSON v. MCCONE, Cal., 53 Pac. Rep. 687.

21. CONTRACT — Lease — Evidence.—An agreement signed by the parties to lease a specified building for a certain time at a stated rental, and which concludes with, "The above to be covered by a regular lease subject to approval by all parties," is not a binding contract.—BOISSEAU v. FULLER, Va., 30 S. E. Rep. 457.

22. CONTRACTS OF COUNTY—Fraud—Collusion.—The fact that a manufacturing company paid the expenses to the Atlanta exposition of a commission appointed to contract for the construction of a jail for a county, and that said company was afterwards granted the contract, does not show fraud or collusion, where it appeared that the purpose was to have the commission examine a modern jail exhibited at that place.—BYERS v. MANLEY MFG. CO., Tenn., 46 S. W. Rep. 548.

23. CONTRACTS OF INDEMNITY—Want of Consideration.—A recovery cannot be had on a contract to indemnify where there has been no performance, or offer to perform, of the promise which was the sole consid-

eration of the agreement to indemnify.—ROGERS v. KIMBALL, Cal., 53 Pac. Rep. 648.

24. CORPORATIONS—Creation of New Powers — Trust Companies.—Under Rev. St. 1889, § 2889, cl. 1, empowering trust corporations to receive moneys, and to allow such interest thereon as may be agreed, such corporations have neither express nor implied authority to receive money on general deposit, upon which no interest is allowed, to be paid out on demand.—STATE v. LINCOLN TRUST CO., Mo., 46 S. W. Rep. 593.

25. CORPORATION—Foreign Corporations.—Acts 1891, ch. 122, prohibits a foreign corporation not having complied with the laws of this State from carrying on the business of loaning money therein, and taking mortgages or deeds of trust to secure the same. Held, that a foreign corporation having no agent or place of business within the State, which loaned money on applications sent to it by loan brokers who were agents of the borrowers, was not doing a business of loaning money in this State, within the meaning of the statute, and that notes and mortgages so taken might be enforced by it.—NORTON v. UNION BANK & TRUST CO., Tenn., 46 S. W. Rep. 544.

26. CORPORATIONS — Insolvency — Priorities — Judgments.—In administering the assets of an insolvent corporation under an equitable proceeding, a judgment obtained before the petition therein was filed is entitled to preference over the claims of unsecured creditors of the corporation, and also over the claims of creditors by mortgage, the lien of which does not attach to the fund for distribution; it is otherwise as to judgments obtained after the filing of such petition, though rendered on actions be un before such filing. —LUBROLINE CO. v. ATHENS SAV. BANK, Ga., 30 S. E. Rep. 409.

27. CORPORATIONS — Subscriptions to Stock.—Where one paid third persons a bonus for securing for him certain corporate stock, being actuated thereto by material and false representations by the company, with which contracts of subscription were then made, and which issued certificates direct to such subscriber, and received payment of assessments on said subscriptions, such third persons are presumed to have been agents of the company, and acting in its behalf.—MCCLANAHAN v. IVANHOE LAND & IMPROVEMENT CO., Va., 30 S. E. Rep. 450.

28. CORPORATIONS—Transfer of Stock—Laws Governing Transaction.—A transfer of stock in a corporation is governed by the laws of the domicile of the corporation, rather than of the place where the transfer occurs.—MASURY v. ARKANSAS NAT. BANK, U. S. C. C., E. D. (Ark.), 87 Fed. Rep. 381.

29. CRIMINAL EVIDENCE — Homicide.—Declarations made by deceased, on the day preceding the homicide, as to where he was going that night, and what he proposed doing on the day following,—defendant not being present,—are inadmissible.—MCBRIDE v. COMMONWEALTH, Va., 30 S. E. Rep. 454.

30. CRIMINAL LAW—Assault with Intent to Kill.—To entitle a prisoner to a discharge under Sand. & H. Dig. § 2161, providing that a person indicted for an offense, and not brought to trial before the end of the third term of court in which the indictment is pending, shall be discharged, unless the delay happened on his application, he must have demanded a trial, or resisted postponements.—DILLARD v. STATE, Ark., 46 S. W. Rep. 533.

31. CRIMINAL LAW — Bigamy.—Under the last clause of Cr. Code 1896, § 4406, which in its entirety provides that "if any person having a former husband or wife living marries another, or continues to cohabit with such second husband or wife in this State, he or she must, on conviction, be imprisoned," etc., it is unnecessary, to constitute the crime of bigamy, that sexual intercourse should continue during the whole time the parties live together, but the crime is committed when they live under the same roof, and acknowledge each other as husband and wife, although they are prevented, by incapacity, from committing the carnal act.—COX v. STATE, Ala., 23 South. Rep. 806.

32. CRIMINAL LAW — Extradition — Warrant.—In a *habeas corpus* proceeding to release a person arrested on an extradition warrant, the admission of certified copies of the requisition and all papers relating thereto, if error, is harmless, where the warrant was sufficient on its face, and the papers offered tended to prove a strict compliance with the law.—EX PARTE WHITE, Tex., 46 S. W. Rep. 639.

33. CRIMINAL LAW — Former Conviction.—Where defendant fired one shot at four fishermen seated around their camp fire, and wounded all of them, a conviction under an indictment charging an assault with intent to murder one of them is a bar to a subsequent prosecution for the same offense against the others.—SADBERRY v. STATE, Tex., 46 S. W. Rep. 639.

34. CRIMINAL LAW — Homicide—Instructions.—An instruction that if the jury believed that K, armed with a concealed deadly weapon, intending to use it on B, killed him, he would be guilty of murder, whether B struck the first blow with a deadly weapon or not, is erroneous, as assuming that K was armed, and discarding malice.—KING v. STATE, Miss., 23 South. Rep. 766.

35. CRIMINAL LAW — Inconsistent Verdict.—Where two persons are jointly indicted for a single offense, and the only evidence is the testimony of one witness which is in every detail identically the same against both, a verdict finding one guilty will be set aside, where the jury disagreed as to the other.—DAVIS v. STATE, Miss., 23 South. Rep. 770.

36. CRIMINAL LAW—Insanity — Manslaughter.—Under Pen. Code 1895, art. 700, making adequate cause for manslaughter such as commonly produces a degree of anger in a person of ordinary temper sufficient to render the mind incapable of cool reflection, an assault and battery so long prior to the killing that a person of "ordinary temper," would have had time for cool reflection would not reduce the killing to manslaughter, though the slayer was a person of more than ordinary temper.—HURST v. STATE, Tex., 46 S. W. Rep. 635.

37. CRIMINAL LAW — Murder — Manslaughter.—Deceased, a prosecuting attorney, without a warrant attempted to arrest one indicted for murder, having warned him that he would take him dead or alive. Accused, on the approach of deceased, borrowed a gun, saying that, if he did not have trouble, he would return it that night. As deceased approached the house, accused said, "There is those men going to arrest me," and, going near to the closed door, fired at deceased through it, killing him. Held to be murder in the first degree.—STATE v. ALBRIGHT, Mo., 46 S. W. Rep. 620.

38. CRIMINAL LAW — Witness — Competency.—Pen. Code, art. 27, provides, "An accused person is termed a convict after final condemnation by the highest court of resort which, by law, has jurisdiction of his case, and to which he may have thought proper to appeal." Held, that an accused, until he has become a convict in fact, by accepting sentence, or judgment against him has been affirmed, is not rendered incompetent as a witness for the State in a criminal prosecution.—STANLEY v. STATE, Tex., 46 S. W. Rep. 645.

39. DAMAGES—Evidence — Mortality Tables.—Standard mortuary tables may be used, in a judicial proceeding, to aid in determining the probable duration of human life. They do not furnish an absolute rule of computation. Each case must stand by itself, on its own conditions.—CAMDEN & A. R. CO. v. WILLIAMS, N. J., 40 Atl. Rep. 634.

40. DAMAGES FOR PERSONAL INJURIES—Pleading.—In an action for personal injuries, where there was evidence of expenses incurred by plaintiff, but he had not pleaded same, an instruction that the jury might allow plaintiff "the expense he has incurred" was erroneous, as permitting a recovery for expenses not claimed in the petition.—HOUSTON & T. C. R. CO. v. ROWELL, Tex., 46 S. W. Rep. 630.

41. DEEDS — Registration — Constructive Delivery.—Acts 1841, providing that every deed shall be considered as registered, and take effect at the time it is noted for registration, does not apply where the deed is noted, but with instructions not to record it until further notice.—TURBERVILLE v. FOWLER, Tenn., 46 S. W. Rep. 577.

42. DISCOVERY — Equity Practice.—The power to direct either party to a suit to give to the other an inspection and copy, or permission to take copy, of any books, papers, and documents in his possession or under his control, is inherent in a court of equity, and can be exercised in the absence of any statute conferring such right.—LAWLESS v. FLEMING, N. J., 40 Atl. Rep. 638.

43. ESTOPPEL BY JUDGMENT.—For a judgment in one suit to operate, as a bar in another, the estoppel must be mutual.—BIDDLE & SMART CO. v. BURNHAM, Me., 40 Atl. Rep. 669.

44. EVIDENCE—Damages — Mortality Tables.—A mortality table in general use by American life insurance companies may be introduced to show the probable duration of an injured person's life, though the particular table introduced has been prepared for the private use of a certain company.—SAN ANTONIO & A. P. RY. CO. v. MORGAN, Tex., 46 S. W. Rep. 672.

45. EVIDENCE — Municipal Ordinance.—An ordinance of a municipal corporation cannot be proven by the introduction of a book purporting to contain the published ordinances of the city, upon the parol testimony of a witness that such book was published by authority of the city.—WESTERN & A. R. CO. v. HIX, Ga., 30 S. E. Rep. 424.

46. EVIDENCE — Parol Evidence.—An unexecuted chattel mortgage is not a written instrument, within the rule preventing the introduction of parol evidence to vary or contradict its terms. Its statements are admissions of the party from whom it proceeds, which may be explained by parol, the same as verbal admissions.—WISE v. COLLINS, Cal., 53 Pac. Rep. 640.

47. FEDERAL COURTS — Jurisdiction.—The federal courts have jurisdiction of an action to recover possession of lands which plaintiff claims by virtue of preemption under the laws of congress, and which defendant claims under an act of congress granting land to railroads, and where it appears that defendant resisted the plaintiff's pre-emption claim in the different stages of the prosecution thereof.—FLORIDA C. & P. R. CO. v. BELL, U. S. C. C. of App., Fifth Circuit, 87 Fed. Rep. 369.

48. FRAUDS, STATUTE OF—Oral Agreements to Convey Land.—Where a party to an oral contract for a conveyance of land had performed her part in full by the rendering of certain services, and the other party had partly performed by putting the former in possession, there is a sufficient part performance to remove the contract from the operation of the statute of frauds.—HILL v. DEN, Cal., 53 Pac. Rep. 642.

49. FRAUDULENT CONVEYANCE.—In order to set aside a conveyance claimed to be fraudulent as to creditors, it must be shown that both grantor and grantee participated in, or had knowledge of, the fraud.—MERCHANTS' BANK OF DANVILLE v. BELT, Va., 30 S. E. Rep. 467.

50. FRAUDULENT CONVEYANCES—Creditors Entitled to Sue.—The surety on the bond of a chancery clerk is a creditor of his principal, within the statute as to fraudulent conveyances, from the date of its execution for all sums paid for defaults occurring after its execution and before its expiration.—AMES v. DORRAH, Miss., 23 South. Rep. 768.

51. FRAUDULENT CONVEYANCES—Parent and Child.—A deed voluntarily conveying land to a daughter is not *per se* fraudulent, though the grantor took the insolvent debtor's oath within a month, since the question whether it was executed to hinder, delay, and defraud creditors was for the jury; but it is *prima facie* fraudulent as to creditors in existence at the time of its execution until the grantee shows by the burden of proof that the grantor retained ample property to pay all his just debts.—TAYLOR v. MALLORY, Va., 30 S. E. Rep. 472.

52. FRAUDULENT CONVEYANCE — Wrongful Attachment.—One cannot defend his attachment of goods on the ground that the conveyance thereof to plaintiff by J was in fraud of creditors, without allegation or proof that he was a creditor of J.—HUTCHISON v. MCCORD-COLLINS COMMERCE CO., Tex., 46 S. W. Rep. 657.

53. GARNISHMENT — Wages of Employee.—Where an employer arranged with a merchant (the employee consenting) to withhold from his future earnings each month enough to cover the amount due for provisions furnished him, not to exceed a specified sum in any one month, such amount in the hands of the employer is not the subject of garnishment by third persons.—HARRISON v. LOUISVILLE & N. R. CO., Ala., 23 South. Rep. 790.

54. HOMESTEAD.—Public land which has in good faith been inclosed, extensively improved, and lived upon for a number of years, although it has not been entered as a homestead, is not subject to entry under the homestead law by other parties.—TUSTIN v. ADAMS, U. S. C. C., D. (Wash.), 87 Fed. Rep. 377.

55. HOMESTEADS—Mortgages—Estoppel.—The abandonment of a city homestead, and the designation of a country place as a homestead, permit the mortgaging of such city property.—WHITE v. DABNEY, Tex., 46 S. W. Rep. 653.

56. HOMESTEAD — Sale by Probate Court.—A probate court in which a guardianship of minors is pending can order sale for their benefit of the homestead left them by their surviving parent.—MERRILL v. HARRIS, Ark., 46 S. W. Rep. 538.

57. HUSBAND AND WIFE—Gift.—A husband exchanged 40 acres of his homestead for a horse, which was delivered to his wife in consideration of her signing the deed. Held to amount to a gift from him to his wife.—TILLIS v. DEAN, Ala., 23 South. Rep. 804.

58. HUSBAND AND WIFE—Vested Right of Husband in Wife's Land.—The right of the husband to the use of the wife's real estate, with power to rent it for three years at a time, and receive the rent, which was conferred upon him by Gen. St. ch. 52, art. 2, § 1, became a vested right when land was acquired by the wife, and therefore, as to land already acquired, was not affected by the act of 1894, declaring that marriage shall give to the husband no interest in the wife's property.—ROSE v. ROSE, Ky., 46 S. W. Rep. 524.

59. INJUNCTION — Mandatory — What Constitutes.—Where a government officer has interrupted the usual course of business of his office, an injunction to prevent the continuance of such interruption, although it would incidentally compel the officer to do certain minor acts necessary in the ordinary course of business, is not mandatory.—FAIRFIELD FLORAL CO. v. BRADBURY, U. S. C. C., D. (Me.), 87 Fed. Rep. 415.

60. INJUNCTION—Ordinances.—The enforcement of a void city ordinance, not resulting in irreparable injury to vested property rights, cannot be restrained by injunction.—WADE v. NUNNELLY, Tex., 46 S. W. Rep. 668.

61. INTOXICATING LIQUOR — Liquor Dealer's Bond—Illegal Sale.—Rev. St. 1895, art. 3380, required a liquor dealer to give a bond not to sell liquor to a person whose wife notified him, as the statute required, not to do so, and provided that the bond could be sued on at the instance of the person aggrieved by a violation of its provisions. Held that, for a sale after a proper notice, a wife could prosecute the offending liquor dealer without joining her husband.—WRIGHT v. TIPTON, Tex., 46 S. W. Rep. 629.

62. JUDICIAL SALE — Foreclosure of Vendor's Lien.—At a foreclosure sale, lands were first offered in parcels, and then as a whole; and the largest offer was for the lands in parcels, which was reported at the sale thereof, and a part of the lands were resold for subsequent upset bids. Held, that a resale on the application of a junior lienholder was not justified in the ab-

sence of an upset bid, or a well-founded assurance that a greater price could be obtained.—MAX MEADOWS LAND & IMPROVEMENT CO. v. MCGAVOCK, Va., 30 S. E. Rep. 460.

63. LANDLORD AND TENANT — Where Relation Exists. —Where one party conveys land to another, and it is agreed between them that the vendor shall remain in possession until a fixed time, when he shall surrender possession to the vendee, the relation of landlord and tenant exists between the two; and a dispossessory warrant will lie in favor of either the purchaser or his successor in title against the seller upon refusal by the latter to deliver possession at the time agreed upon.—PRICHARD v. TABOR, Ga., 30 S. E. Rep. 415.

64. LIFE INSURANCE — Assignment.—The provision in a life insurance policy making it incontestable after it has been in force one year if the premiums are paid refers to matters connected with its issuance, and not its assignment.—CLEMENT v. NEW YORK LIFE INS. CO., Tenn., 46 S. W. Rep. 561.

65. MANDAMUS FROM SUPREME COURT — When Issues. —When the supreme court finds certain facts from the evidence, states conclusions of law applicable to them, reverses the decree of the lowest court, and remands the case, with directions to that court to make its findings and conclusions conform to the findings and conclusions of the supreme court, and the lower court fails to obey such directions, a writ of *mandamus* will issue from the supreme court, requiring it to do so, and to enter a decree thereon.—STATE v. NORRELL, Utah, 53 Pac. Rep. 610.

66. MARRIED WOMAN — Right of Action.—Const. art. 17, § 9, provides that the property of a woman held at the time of her marriage, or thereafter acquired, shall be her separate property, and "she shall have all the rights incident to the same to which an unmarried woman or man is entitled." Held, that an unauthorized levy upon her property to satisfy a debt of her husband, by which she was damaged, constitutes a good cause of action.—HOLTZCLAW v. GASSAWAY, S. Car., 30 S. E. Rep. 399.

67. MASTER AND SERVANT — Contract to Furnish Medical Attention.—A railroad company, which contracts to furnish its employees medical service in case of accident, is not liable for damages resulting to an employee by his being treated for sprained muscles instead of a dislocated hip; the servants of the company having used ordinary care in calling the physician they did at the time he was injured, and he having refused to go to the company's hospital for treatment, though requested, and though it was the rule that all injured should be taken there as soon as practicable. —SOUTHERN PAC. CO. v. MAULDIN, Tex., 46 S. W. Rep. 650.

68. MASTER AND SERVANT — Negligence—Contract for Transportation of Employees.—Employees of an express company, who had no knowledge of a contract between such company and a railroad company to the effect that such employees were to be furnished free transportation over the railroad at their own risk while in the service of the express company, are not bound thereby.—CHAMBERLAIN v. PIERSON, U. S. C. C. of App., Fourth Circuit, 87 Fed. Rep. 420.

69. MORTGAGES—Consideration.—B's payment of a mortgage on J's land, consolidating this with a loan previously made, and extending the whole matter, constitutes a sufficient consideration for a trust deed from J's mother to B of what she considered her share of her mother's land, viz., a one-fourth interest, and a subsequent trust deed from J's mother and grandmother of a one-fourth interest in the grandmother's land.—TALLEY v. BUCHANAN, Tenn., 46 S. W. Rep. 542.

70. MORTGAGES — Provisions Binding upon Bondholders.—A mortgage and the bonds and coupons secured thereby are to be construed as one contract, and provisions in the mortgage as to the method of distribution of the proceeds in case of foreclosure sale, although not found in the bonds, will bind the bondholders where there is nothing in the bonds inconsistent therewith.—LOW v. BLACKFORD, U. S. C. C. of App., Fourth Circuit, 87 Fed. Rep. 392.

71. MORTGAGE—Trust Deed—Foreclosure—Judgment and Sale.—A trust deed provided that on default in payment of the note it secured, together with accrued interest according to its terms, at its maturity, the trustee might, on request of the holder of the note at any time after its maturity, sell the land to pay the note, accrued interest, etc. Held, that a sale could not be made until default in payment of both principal and interest due at the note's maturity, and not then except at the request of the holder subsequent to maturity.—HARROLD v. WARREN, Tex., 46 S. W. Rep. 657.

72. MUNICIPAL CORPORATIONS—Contractors' Bonds.— A material-man may sue on a bond given a city for the performance of a contract and for the payment for material used, though he be not a party to the contract. —DEVERS v. HOWARD, Mo., 46 S. W. Rep. 625.

73. MUNICIPAL OFFICER — Compensation.—A former officer of a municipal corporation who has been dispossessed by a subsequent appointee cannot maintain *assumpsit* against it for salary during the time he is not the incumbent, until his right to the office has been adjudicated.—LEE v. MAYOR, ETC. OF WILMINGTON, Del., 40 Atl. Rep. 663.

74. PRINCIPAL AND AGENT—Authority of Agent.— Where a foreign corporation, by a long-continued course of dealing held out a trust and investment company as its general agent, through whom its loans were made, as having authority to receive payment of both principal and interest, a mortgagor with knowledge of these facts has the right to presume that such agent, demanding payment, has authority to receive same; and payment in good faith to it is binding on the mortgagee.—FIRST NAT. BANK OF CARTHAGE v. MUTUAL BEN. LIFE INS. CO. OF NEWARK, N. J., Mo., 46 S. W. Rep. 615.

75. PRINCIPAL AND AGENT — Authority of Agent—Accommodation Note.—One who holds a note for collection cannot, without authority from the holder, agree to discharge one of the joint makers upon payment by him of a part of the sum due.—TOBBIT v. HEATH, Colo., 53 Pac. Rep. 615.

76. PRINCIPAL AND AGENT—When Relations Exists.— An agreement by which A is to sell the goods of B at specified prices, receiving a commission for his services, and to report all orders to B, who is to enter them as sales to A, creates the relation of principal and agent under a *del credere* commission, and not that of vendor and purchaser.—ATLAS GLASS CO. v. BALL BROS. GLASS MFG. CO., U. S. C. C., N. D. (N. Y.), 87 Fed. Rep. 418.

77. RAILROADS—Power to Lease.—A railroad company organized under a legislative statute has no power to lease another railroad unless it is expressly granted by said statute.—STATE v. MONTANA RY. CO., Mont., 53 Pac. Rep. 623.

78. RAILROAD COMPANIES — Negligence.—A brakeman in charge of a car running down grade without any engine is bound to keep a lookout for obstructions, and, if a proper lookout therefor would reveal a person on the track, in a perilous condition, is bound to save him if practicable.—LOUISVILLE & N. R. CO. v. THORNTON, Ala., 23 South. Rep. 778.

79. RAILROAD COMPANIES—Negligence — Dangerous Premises.—A railroad company which maintains a turntable upon its own land is not liable for an injury to a child who comes upon the land and receives the injury by playing with the turntable, without any invitation express or implied.—TURESS v. NEW YORK, S. & W. R. CO., N. J., 40 Atl. Rep. 614.

80. RAILROAD COMPANIES—Street Railroads—Injury to Child.—That a child two years and three months old, to whom contributory negligence cannot be imputed, was suffered to roam unattended in the public street, cannot relieve a traction company from liability for his negligence in the management of its car, re-

sulting in the child's death.—BERGEN COUNTY TRACTION CO. v. HEITMAN'S ADMR., N. J., 40 Atl. Rep. 651.

81. RECEIVERS—Certificates—Priority of Lien.—While a court of chancery has power to appoint receivers to operate an insolvent corporation, and direct the issuance of receivers' certificates, which shall constitute a paramount lien on the corporate property, such power should be exercised with caution, and never without notice to those whose interests will be affected thereby. —OSBORNE v. BIGSTONE GAP COLLIERY CO., Va., 30 S. E. Rep. 446.

82. REMOVAL OF CAUSES — Diverse Citizenship.—Where all the plaintiffs in an action originally brought against a corporation of this State are residents thereof, and, under an amendment filed by them, citizens of another State are made parties defendant, the latter are not entitled, upon the ground of "diverse citizenship," to remove the case to a circuit court of the United States.—YOUNG v. OAKES, Ga., 30 S. E. Rep. 432.

83. RES AD JUDICATA—Federal and State Courts.—The decision in an interpleader suit in a State court, that no lien was obtained by a certain attachment levy, is binding upon the federal court to which the original attachment suit has been removed.—MONTGOMERY v. MCDERMOTT, U. S. C. C., S. D. (N. Y.), 87 Fed. Rep. 374.

84. SALES — Implied Warranty.—In the absence of warranty as to quality, the fact that macadam was mixed with dust is no defense to an action for the price, where, before purchase, the buyer examined the identical macadam delivered, and said it would suit.—MOORE v. BARBER ASPHALT PAVING CO., Ala., 23 South. Rep. 798.

85. SPECIFIC PERFORMANCE—Contracts.—Equity will not enforce specific performance of a contract of sale not stating the time and terms of the deferred payments.—BERRY v. WORTHAM, Va., 30 S. E. Rep. 448.

86. TAXATION — Building and Loan Associations.—Rev. St. 1889, § 7539, providing that building and loan associations shall be taxed by the persons holding shares therein on which no loan has been obtained from it, returning the same for taxation, and paying the tax levied thereon, excludes levy of any tax against the association in its own name.—CITY OF KANSAS CITY v. MERCANTILE MUT. BUILDING & LOAN ASSN., Mo., 46 S. W. Rep. 624.

87. TAXATION—Exemptions—Banks—Capital Stock.—Const. art. 2, § 28, ordaining that "all property" shall be taxed according to its value, ascertained as the legislature shall direct, is not self-executing; and therefore, under Assessment Act 1895, § 10, providing that no tax shall be assessed on the capital stock of any bank, but that the shares shall be assessed to the stockholders, no *ad valorem* tax can be assessed on such capital stock, and an attempted assessment is void.—UNION & PLANTERS' BANK v. CITY OF MEMPHIS, Tenn., 46 S. W. Rep. 557.

88. TAXATION—Recovery of Taxes — Defenses.—Since distinctions between law and equity are disregarded as to questions of jurisdiction over matter pleaded, and equitable defenses are allowed to actions at law, fraud of a board of equalization in raising an assessment may be properly pleaded as a defense and cross action in a suit to recover taxes levied on such assessment.—MANN v. STATE, Tex., 46 S. W. Rep. 652.

89. TELEGRAPH COMPANIES—Designation of Streets.—The legal duty imposed upon municipal bodies by said act of April 27, 1888, to designate streets and highways on which a telegraph or telephone line may be constructed, exists only for the construction of such a line through the municipality, and does not arise with respect to the construction of a local system of lines within the municipality.—STATE v. COMMON COUNCIL OF CITY OF NEW BRUNSWICK, N. J., 40 Atl. Rep. 628.

90. TENDER — Sufficiency.—A written offer to pay a particular sum is not a tender where the person making it knew that it could not be complied with by the other party, and he had no intention of having the money ready for acceptance, nor was he able to make the tender good.—MCCOURT v. JOHNS, Oreg., 53 Pac. Rep. 601.

91. TRESPASS—Damages — Injuries to Feelings.—Actual damages cannot be recovered for injury to one's feelings, in a suit for nothing more than wrongfully depriving plaintiff of the possession of property without violence to his person.—WILLIAMS v. YOE, Tex., 46 S. W. Rep. 659.

92. TROVER — When Maintainable.—An action of trover for the recovery of money must be based on a legal obligation upon the part of the defendant to deliver specific money to the plaintiff. Such an action cannot, therefore, be maintained to recover a sum of money agreed upon by the plaintiff and defendant, in a settlement of their partnership business, as an amount owing by the latter to the former from the assets of the firm then in hand.—COOKE v. BRYANT, Ga., 30 S. E. Rep. 435.

93. TRUSTS — Evidence — Certainty.—Where it is sought to establish a trust in shares of stock in possession of decedent at the time of his death, the certainty required by the evidence is such as is sufficient to satisfy the jury of its existence.—MARSHALL v. FLEMING, Colo., 53 Pac. Rep. 620.

94. TRUSTS — Jurisdiction to Enforce.—Under Const. art. 6, § 11, giving district courts jurisdiction of all causes at law and in equity, and article 6, § 23, giving county courts jurisdiction in all matters of probate, settlement, of estates of decedents, appointment of guardians and administrators, and settlement of their accounts, the district court, and not the county court, has exclusive jurisdiction of a suit brought against the estate of a decedent to enforce a trust against mining stock in his possession when he died.—MARSHALL v. MARSHALL, Colo., 53 Pac. Rep. 617.

95. VENDOR AND PURCHASER—Use of Streets—Dedication.—The right of a purchaser of lots, bought in accordance with a map upon which streets are laid out, to restrain the vendor from afterwards closing the streets, does not extend to a third person who has acquired no rights therein.—CITY OF NORFOLK v. NOTTINGHAM, Va., 30 S. E. Rep. 444.

96. WILLS — Devise — Condition Subsequent.—A clause in a testator's will devised to his wife for life his homestead and five acres of land, with the expressed understanding that his son would support and take care of her, and at her death the homestead and land were to return to his son "as compensation therefor." The will also required his son to support and provide for his two sisters while they were single. The testator's wife died more than a year before he did, and he made no change in his will. Held, that the condition on which the homestead and five acres vested in the son was a condition subsequent, and he acquired an absolute title.—BURDIS v. BURDIS, Va., 30 S. E. Rep. 462.

97. WILLS—Devises — Restrictions on Alienation.—A restriction on alienation in a devise, though the restriction be for a limited time or to a limited class of persons, is nugatory, unless there is a reversion or limitation over to a third person provided for on violation of the restricting clause.—FOWLKES v. WAGONER, Tenn., 46 S. W. Rep. 586.

98. WILL—Trusts — Rule in Shelley's Case.—A devise of land to one for life, and on her death to vest in the heirs of her body "in such shares as they would take as representatives at law, free and discharged of all further trusts and limitations," creates an estate in fee conditional in the first taker, governed by the rule in Shelley's case.—SIMMS v. BUIST, S. Car., 30 S. E. Rep. 400.

99. WITNESS—Impeachment.—An impeaching witness cannot testify on direct examination as to particular acts of immorality between a defendant and his witnesses, to show them unworthy of belief, unless such acts directly show the impeached witnesses to be unworthy of credit.—SWEET v. GILMORE, S. Car., 30 S. E. Rep. 395.